STATE OF MICHIGAN
IN THE SUPREME COURT

LEON V. BONNER and
MARILYN E. BONNER,

Plaintiffs-Appellees,

-vs-

CITY OF BRIGHTON,

Defendant - Appellant.

Michigan Supreme Court
Case No. 146520

Court of Appeals
Case No. 302677

Livingston Circuit Court
Case No. 09-24680-CZ

Consolidated with:
Livingston Circuit Court
Case No. 09-24900-CZ

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BRIEF *AMICUS CURIAE* OF THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF DEFENDANT/APPELLANT, CITY OF BRIGHTON

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STATEMENT OF THE BASIS OF JURISDICTION

The Livingston County Circuit Court entered an Opinion and Order granting summary disposition in favor of the Plaintiffs on November 23, 2010. Defendant/Appellant, City of Brighton ("City") timely filed a Claim of Appeal from the Opinion and Order (Michigan Court of Appeals Docket no. 30267. On December 4, 2012, the Court of Appeals issued its opinion affirming the Opinion and Order of the Livingston County Circuit Court. *Bonner v Brighton*, 298 Mich App 693; 828 NW2d 408 (2012).

The City timely filed an Application for Leave to Appeal to this Court. This Court granted leave to appeal by its Order dated July 1, 2013. In its Order, the Court invited the Public Corporation Law Section of the State Bar of Michigan to file this *Amicus Curiae* Brief.

This Court has jurisdiction pursuant MCR 7.301(A), 7.302.

Amicus Curiae, the Public Corporation Section of the State Bar of Michigan, supports Defendant/Appellant's position for the reasons contained in this Brief.

STATEMENT OF THE QUESTIONS PRESENTED

Defendant/Appellant, City of Brighton ("City"), has addressed, among others, the two issues raised in this Court's Order granting leave. *Amicus Curiae* adopts by reference and supports the arguments made by the Defendant/Appellant, City of Brighton, on all the issues that are before this Court. *Amicus Curiae* addresses the issues requested by this Court in the Order dated July 1, 2013.

I. DID THE MAJORITY OF THE COURT OF APPEALS VIOLATE THE SEPARATION OF POWERS DOCTRINE WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE CITY IN REQUIRING A REPAIR OPTION IN BRIGHTON CODE OF ORDINANCES, SECTION 18-59?

Plaintiff/Appellee Answers: Yes
Defendant/Appellant Answers: No
Trial Court Answered: Yes
Court of Appeals Answered: Yes
Amicus Curiae Answers: No

II. DOES THE BRIGHTON CODE OF ORDINANCES, SECTION 18-59, VIOLATE SUBSTANTIVE DUE PROCESS ON ITS FACE?

Plaintiff/Appellee Answers: Yes
Defendant/Appellant Answers: No
Trial Court Answered: Yes
Court of Appeals Answered: Yes
Amicus Curiae Answers: No

III. DOES THE BRIGHTON CODE OF ORDINANCES, SECTION 18-59, VIOLATE PROCEDURAL DUE PROCESS ON ITS FACE?

Plaintiff/Appellee Answers: Yes
Defendant/Appellant Answers: No
Trial Court Answered: Did Not Answer
Court of Appeals Answered: Yes
Amicus Curiae Answers: No

STATEMENT OF INTEREST

The Public Corporation Law Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 590 attorneys who generally represent the interests of government corporations, agencies, departments and boards, including townships, counties, villages, cities, schools and charter and special authorities. The Public Corporation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the State Bar of Michigan website, public service programs, and publication of *Public Corporation Law Quarterly*. Although membership in the Public Corporation Section is open to all members of the State Bar, the focus of the Section is centered on laws and procedures relating to public law and government corporations, agencies, departments and boards, including townships, counties, villages, cities, schools and charter or special authorities. The Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Public Corporation Law Section of the State Bar of Michigan participates in cases that are significant to governmental entities throughout the State of Michigan. The Public Corporation Law Section has filed numerous *Amicus Curiae* briefs before the appellate courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is comprised of 21 members. The filing of this *Amicus Curiae* was authorized at the August 2, 2013 regular meeting of the Council. Sixteen Council members were present at the meeting, and the motion passed on a vote of 15-0, with one abstention. No Council member opposed the filing. The position expressed in this *Amicus Curiae* Brief is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan.

The issues presented in this case have significant public interest to all municipalities in the State of Michigan. The relevant issues have broader implication than just this case as they

materially impact the ability of municipalities throughout the State of Michigan to protect against, and take appropriate responsive action with respect to, blighted and dangerous properties, and to maintain the health, safety and welfare of the community from the dangers associated with structures that have not been maintained or that have been essentially abandoned.

The Public Corporation Law Section will address the following issues: (1) whether the majority of the Court of Appeals violated the separation of powers doctrine when it substituted its judgment for that of the City by requiring a repair option in BCO Section 18-59; (2) whether BCO Section 18-59 is facially unconstitutional as a violation of substantive due process; and, (3) whether BCO Section 18-59 on its face violates procedural due process.

SUMMARY OF ARGUMENT AND INTRODUCTION

Lack of maintenance and outright abandonment of private properties has become a widespread phenomenon plaguing many local governments throughout the state. The presence of blighted structures negatively impacts surrounding properties and the community image as a whole. Abandoned properties can spur negative social and economic patterns that impact the quality of life in the entire community, are related to increased property and violent crime, and tax limited municipal resources.[1] Defendant/Appellant, City of Brighton ("City"), has among its various tools for dealing with neglected properties Section 18-59 of the Brighton Code of Ordinances ("BCO") to address this widespread and serious plague. (Exhibit A, relevant sections of Brighton Code of Ordinances). This ordinance permits the City to have an unsafe structure demolished as a public nuisance where the costs to repair or rehabilitate the structure exceed 100 percent of the structure's true cash value as reflected in the City's assessment records. The ordinance further provides a mechanism in BCO Section 18-61 for a property

[1] See studies referenced in *Amicus Curiae* Brief of the Michigan Municipal League.

owner to appeal to the City Council the Building Official's decision to demolish, where the property owner can present evidence to rebut the presumption that the structure is a public nuisance and show that the structure could be reasonably repaired, thus affording procedural due process to the property owner.

The City of Brighton is located in the southeast portion of Livingston County. The City has approximately 7,500 residents. One of the unique characteristics that make the City stand out from others is its "up-to-date, old-time Michigan downtown." The downtown area was historically a small settlement near an old plank road that later became Grand River Avenue. The downtown area is filled with one-of-a-kind shops and restaurants, as well as a park.

Plaintiffs, Leon and Marilyn Bonner, own two properties located in the downtown area at 116 and 122 East North Street. One parcel contains an old house, and the other an old house with a garage/barn.[2] The parcels are zoned Downtown Business District, and single-family ground floor residences are ***prohibited uses*** under the City's zoning regulations.[3] (Exhibit B, Downtown Business District regulations). The structures in question have stood unoccupied and basically unmaintained for over 30 years. Due to Plaintiff's willful neglect, the City was put in the position of having to seek demolition of the dilapidated and dangerous structures under BCO Section 18-59. Plaintiffs invoked their right to a hearing before the City Council, and were given notice and an opportunity to present their position as to why demolition should not take place. Plaintiffs suggested that they should be given the opportunity to repair the structures, even though the Building Official had determined the cost to repair would exceed 100% of the

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[2] Plaintiffs' refer to the structures as "historic" when there is no evidence that the structures have any historic significance under state law or local ordinance. Plaintiffs' structures are simply old and unmaintained.

[3] The residential homes were previously nonconforming structures under the City's Code. Plaintiffs lost this nonconforming use by abandoning the buildings for a significant period of time, and otherwise taking actions such as disconnecting utilities. Any future use of the structures would be limited to the uses permitted in the Downtown Business District. Repairing the structures in their residential form would be essentially pouring money down a drain.

true cash value of the structures, and even though Plaintiffs had caused the structures to be in the dangerous state through their lack of maintenance for over 30 years. The City Council considered all the facts and evidence, and upheld the demolition of these structures, which were an eyesore and a danger in the downtown area. Quite simply, the structures would have had to be essentially reconstructed, beginning with the actual foundations, which were failing.

Plaintiffs filed their lawsuit in 2009. While the case has been pending, the structures have continued to deteriorate. The City has been forced to spend significant public funds defending this lawsuit and attempting to enforce the demolition order. The ordinance found to be facially unconstitutional by the Trial Court and the majority of the Court of Appeals is in effect in a number of communities in the State of Michigan. In fact, a similar provision in the State Housing Law relating to dangerous buildings, MCL 125.541, provides that where a local governmental agency has found a building to be dangerous, and the cost of repairs is found to be equal to the state equalized value (SEV) of the structure—that is, 50% (not even 100%) of the cash value—there exists a "rebuttable presumption" that the building requires "immediate demolition." The Court of Appeals' decision would presumably strike down that section of the state law as well. The City's ordinance provides an effective way for government to deal with dangerous structures in a timely and cost-effective manner. The Court of Appeals' decision in this case will have a significant impact on a municipality's ability to deal with this problematic community issue.

On November 23, 2010, the Trial Court issued an opinion holding that BCO Section 18-59 was unconstitutional ***on its face*** as a violation of substantive due process. (Exhibit C, 11/23/10 Opinion and Order of Trial Court on Plaintiff's Motion for Partial Summary Disposition). The Trial Court found the ordinance unconstitutional because it failed to allow a "right to repair"

if requested by the property owner. The Trial Court did not rule that the ordinance violated procedural due process.

The Court of Appeal affirmed in a 2-1 decision. (Exhibit D, *Bonner v City of Brighton*, 298 Mich App 693; 828 NW2d 408 (2012)). Despite recognizing the City's "legitimate legislative objective of keeping citizens safe and free from harm" (*Id.* at 697) through the demolition of unsafe structures, the majority nonetheless ruled that the ordinance's failure to include a "repair option" resulted in the ordinance being arbitrary and capricious on its face. The Court of Appeals believed that Plaintiffs had a right to repair, regardless of the nature and extent of the code violations, and that it would not be appropriate to look to the wisdom of the financial decision being made by Plaintiffs. But the majority went even further than the Trial Court. Even though the issue had not been decided by the Trial Court, or raised in the briefs on appeal, the majority of the Court of Appeals also found Section 18-59 facially unconstitutional as a violation of procedural due process because the ordinance did not include the repair option.

The dissenting opinion of Judge Murray concluded that the ordinance did not violate Plaintiffs' substantive or procedural due process rights on the grounds that: (1) there are circumstances under which the ordinance is valid, defeating the facial challenge; (2) the procedural due process issue was not properly before the court; and (3) even if the procedural due process issue was before the court, Plaintiffs' procedural due process rights had not been violated as Plaintiffs had received notice and had an opportunity to appear and present evidence before an impartial tribunal.

The Michigan Supreme Court has clearly and consistently held that legislative decisions made by local governments should be given "fairly debatable," or rational basis, review. This standard is derived from the separation of powers doctrine. The purpose is to make sure that

the judiciary, while appropriately checking the validity of legislative action, does not encroach too far into the legislative and discretionary public policy decisions. Under the rational basis standard of review, the presumption is that the ordinance is valid and the court should uphold the ordinance if there is a rational relationship between the legislative decision and the legitimate governmental interest. Here, the majority of the Court of Appeals failed to apply the rational basis test, and instead substituted its own judgment for that of the legislative body, all the while acknowledging the legitimate governmental interests sought to be advanced.

The majority of the Court of Appeals also disregarded the high standard to hold an ordinance "facially" unconstitutional. Courts generally acknowledge that those making a facial challenge to an ordinance face an "uphill battle," because they must prove that the ordinance, on its face, is unconstitutional as to ***all*** properties to which the ordinance may apply—without any analysis of any specifics. As aptly stated by Judge Murray in his dissent, there are unquestionably circumstances where the requirement of demolition contained in BCO Section 18-59 on the basis of the 100% factor would be perfectly valid.

Lastly, although the issue was not ruled upon by the Trial Court or briefed by the parties, the majority of the Court of Appeals found that the ordinance violated procedural due process on its face. In so holding, the majority blurred the clear line between a substantive and procedural due process claim. Although acknowledging the long-standing rule of law that procedural due process only requires basic notice and an opportunity to be heard before an impartial tribunal, the majority expanded the elements of a ***procedural*** due process claim to include a "right to repair." This published ruling enlarges the minimal procedural due process protections required under the law through inquiry into the substance of the claims based on the particular facts, thereby blending the distinct elements of the two different claims – substantive versus procedural - so the line of demarcation no longer exists.

Amicus Curiae submits that the majority of the Court of Appeals applied the incorrect standard of review to the claims. The majority failed to afford the City the deference mandated by law with respect to its important policy decisions to address the public health and safety hazards associated with unsafe, dangerous and abandoned structures. When the correct standard is applied, it is clear that no facial constitutional violations exist.

STATEMENT OF FACTS

Amicus Curiae, Public Corporation Law Section of the State Bar of Michigan agrees with and adopts the Statement of Facts as presented by the City in its Brief on Appeal.

STANDARD OF REVIEW

The court reviews *de novo* the decision on a motion for summary disposition. *Kusner v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Constitutional issues and questions concerning the proper construction of an ordinance are also reviewed *de novo*. *Kyser v Kasson Twp*, 486 Mich 514, 519; 786 NW2d 543 (2010).

ARGUMENT

The Michigan and U.S. Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law. Const 1963, art 1, § 17; U.S. Const. Am XIV. The due process clauses contain both a procedural and substantive component.

A. The majority of the Court of Appeals violated the separation of powers doctrine when it substituted its judgment for that of the City in requiring a repair option in BCO Section 18-59.

> *"It is immaterial that we, as legislators, would have been wiser. We are acutely aware of the doctrine of the separation of powers. A legislative determination within its sphere of government is conclusive upon us." Robinson v Bloomfield Hills*, 350 Mich 425, 437; 86 NW2d 166 (1957).

This case is remarkable because it is such a significant departure from well-settled constitutional law. Michigan courts have long recognized that the legislature is in the best

position, institutionally and politically, to make the policy decisions required in enacting legislation to promote the public health, safety, and welfare. As stated in *Kropf v Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974), (quoting *Brae Burn, Inc v Bloomfield Hills,* 350 Mich 425, 430-431; 86 NW2d 166 (1957):

> [T]his Court does not sit as a superzoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts. We not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises. As Willoughby phrased it in his treatise, Constitution of the United States (2d ed, 1929), vol 1, § 21, p 32: 'The constitutional power of a law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly the subject to judicial criticism or control.' *Id.* at 161.

The strong mandate that the courts should not make substantive policy is the underpinning of the separation of powers doctrine. Simply stated, the proper body for making substantive local policy decisions is the local legislature: "[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and life." *Robinson v Bloomfield Hills*, 350 Mich at 431.

But the judiciary is not without a role. The courts provide a check against the legislature. But that judicial role is limited to checking for an abuse of the legislative function. It is not the role of the courts to "second guess" the discretionary, policy decisions made by the legislature. With respect to a due process claim, the function of the courts is not to determine whether the legislation was "correct," but only whether the legislative decision was clearly and

wholly unreasonable. To ensure that the separation of powers doctrine is not violated, courts need to avoid entering the legislative realm, and must take a highly deferential view of the legislation.

The Court of Appeals recognized that the ordinance was presumed to be constitutional, that it should exercise great caution in finding an ordinance unconstitutional, and that Plaintiffs had the burden of proof. *Id.* p 707-708. Yet, the majority of the Court of Appeals substituted its judgment for that of the legislative body when it determined that a right to repair would also advance the governmental interest being addressed by the City. By doing so, the majority ignored the fact that the power of local legislative bodies to exercise value judgments is at the very heart of a municipality's general policy-making efforts to protect the quality of life for its residents.

More specifically, the majority of the Court of Appeals violated that rule when it overlooked the presumption of constitutionality of BCO Section 18-59, when it substituted its judgment for that of the local legislative body, and when it failed to apply the correct standard in its review of the ordinance. The Court of Appeals also erred when it found a *facial* procedural due process violation when the ordinance unquestionably provided notice and an opportunity to be heard, and Plaintiffs availed themselves of that procedure. The Court of Appeals' expansion of the law of procedural due process to include a "repair right" resulted in a blurring of the lines between a substantive and procedural claim – two distinct causes of action. The majority's decision resulted in a violation of the separation of powers doctrine and a substitution of the majority's policy judgment over that of the City legislature.

B. BCO Section 18-59 is not unconstitutional on its face where there are circumstances under which the ordinance will not violate a property owner's substantive due process rights.

1. Plaintiffs failed to meet their burden to establish a facial constitutional violation.

> *"Because a facial challenge attacks the ordinance itself, as opposed to how it is applied, a court must uphold the law if there are any circumstances under which it could be valid." Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 804 (2007).

A "facial" challenge to an ordinance directly challenges the policy decision made by a governmental entity. A facial challenge is extremely difficult to prove, and courts have stated that a party asserting a facial claim "faces an uphill battle." *Suitum v Tahoe Regional Planning Agency*, 520 US 725, FN 10 (1997); *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 495, 107 S Ct 1232, 1247, 94 L Ed 2d 472 (1987). A facial challenge is exactly that—the property owner is asserting that the ordinance, on its face, is unconstitutional as to all properties in all conceivable situations without any analysis of specifics of the subject property or other factors. For example, a regulation may facially violate substantive due process if from the text of the ordinance a court can hold that it is so restrictive, arbitrary and unreasonable that there is no conceivable situation or set of facts that could cure the deficiency, and the court does not need to review or take into consideration the factual situation to which it has been applied.

By contrast to a facial challenge, an "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in the process of actual execution or application of the ordinance to a particular factual situation. *Paragon v City of Novi*, 452 Mich 568, 576 (1996) (citing *Village of Euclid v Ambler Realty Co*, 272 US 365, 395, 47 S Ct 114, 71 L Ed 2d 303 (1926)). Unlike a facial challenge, a court must look at the

challenged legislation as enforced against the plaintiff, and plaintiff's peculiar set of circumstances.

What makes a facial challenge so rare is that the law must be so "out of bounds" that there is no set of circumstances that might conceivably justify its existence. As correctly noted in Judge Murray's dissent in the Court of Appeals:

> A facial challenge attacks the very existence of the ordinance, requiring plaintiffs to establish that 'the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. *Hendee v Putnam Twp,* 486 Mich 556, 589; 786 NW2d 521 (2010) (CORRIGAN,J., *concurring*).... Because a facial challenge attacks the ordinance itself, as opposed to how it is applied, a court must uphold the law if there are *any* circumstances under which it could be valid. *Keenan [v Dawson,* 275 Mich App 671, 680; 739 NW2d 804 (2007)]. In other words, even if facts can be conjured up that would make the law arguably constitutional, 'if any set of facts reasonably can be conceived that would sustain [an ordinance].' Those facts must be assumed and the ordinance upheld. *Council of Organizations [v Governor,* 455 Mich 557, 567; 566 NW2d 208 (1997)]. And, because it is a facial challenge, the actual facts surrounding plaintiffs' case are irrelevant. (Citations omitted). *Id.* at 734.

Even the majority of the Court of Appeals *appeared* to recognize the difficulty of Plaintiffs' burden:

> "We acknowledged in footnote 13 of this opinion that there is a provision in BCO Section 18-59 that allows repairs for structures damaged by events beyond an owner's control, and we recognize that the fact that an ordinance might operate in an unconstitutional manner under some conceivable circumstances is insufficient to find it unconstitutional. See *Council of Orgs & Others for Ed About Parochiad, Inc v Governor,* 455 Mich 557, 568-569, 566 NW2d 208 (1997). *Id.* at 728.

Yet, the majority felt that the dissenting opinion was relying only on the language which permitted a structure to be repaired when the damage was a result of matters outside of the control of the property owner, and gave the dissent short shrift by stating that particular portion of the ordinance was not being invalidated. However, the majority specifically acknowledged

elsewhere in the opinion that there ***could*** be situations under which the ordinance could be sustained:

> We recognize that there may occasionally be unique circumstances in which repair efforts cannot be allowed, despite a willingness by the property owner to do so, such as where repairs necessary to meet code requirements cannot be designed or cannot be accomplished in a safe and timely manner. *Id.* at 717, FN 14.[4]

That statement, in and of itself, makes the Court's ultimate conclusion incorrect and reversible error.

Plaintiffs cite to a number of out-of-jurisdiction cases in support of their position that the absence of a right to repair facially invalidates BCO 18-59. It will not be lost on this Court in reviewing those cases that: (1) none of the cases found the ordinance or statute in question ***facially*** unconstitutional; (2) none of the cases involved an analysis of a facial versus as-applied challenge to the regulation; (3) the decisions in each of the cases were made after the court reviewed the specific facts, evidence, and the full record, i.e., the decisions were based "on the circumstances of the case" (e.g. *Horton v Gulledge*, 277 NC 353 [p 8 in appendix] (1970); (4) the cases did not generally involve specific substantive or procedural due process claims but instead were appeals of the demolition decision based on the record in the case; and

[4] Given the fact that the three structures' combined cash value was only $85,000.00, and the costs to repair estimated by the City at $158,000.00 (which included serious fundamental flaws in the structures, including crumbling foundations and walls), isn't it highly likely that the repairs to Plaintiffs' structures "could not be accomplished in a safe and timely manner?" In addition, it is difficult to understand the Trial Court and majority's perception that it is "unreasonable" for the City to require demolition of a structure when the dangerous conditions are so extensive that the cost to repair is nearly ***double*** the value of the structures, and that repairs should be permitted even if the repairs would really be "unreasonable" under the circumstances. Plaintiffs state on page 29 of their Brief that an arbitrary action is one that is done capriciously, without consideration of the facts and circumstances, and done without exercising fair reason or judgment. Query: If there were 100 structures ordered demolished because the repair costs exceeded 100% of the value, what number of those property owners would rationally decide that it would be reasonable to repair versus demolish? Dose an ordinance lack all rational basis if one of the 100 property owners wants to waste his/her money and make a poor economic decision? Under the circumstances present in this case—Plaintiffs neglect of the structures for over 30 years, the structures long-term disconnection from utilities, and long term vacancy of the structures—one could reasonably say that Plaintiffs' actions in now wanting to repair are nothing more than evidence of bad faith and irrationality.

(5) all the cases acknowledged the legitimate police power of a municipality to protect the public from unsafe structures and that there was a rational basis in ordering demolition of a structure if there is sufficient factual support for the same as it related to the specific structure. In summary, the cases cited by Plaintiffs do not support their facial constitutional challenges; instead, they support the City's position that BCO 18-59 is facially constitutional. Throughout their Brief, Plaintiffs emphasize the facts in the case (spun to both mislead this Court and to expand the record with information not part of the record below), to steer this Court from the clear, fatal flaw in the ruling—that the Trial Court and the majority of the Court of Appeals analyzed the facts to ***facially*** invalidate the ordinance, in contravention of clear and established law to the contrary.

As discussed above, in order to find that an ordinance facially violates due process, it would need to be determined that the ordinance—on its face, ***applied to all properties and situations***—furthers no conceivable governmental interest. Yet, the majority of the Court of Appeals conceded in the opinion that there *could* be circumstances where the ordinance would pass constitutional muster based on a factual analysis of the situation, such as instances where the repairs could not be completed safely or in a timely manner. The correct analysis was not conducted or completed in this case.

2. BCO Section 18-59 passes constitutional scrutiny under the rational basis test.

> *"Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with mathematical nicety, or even whether it results in some inequity when put into practice.' ... Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose." Conlin v Scio Twp,* 262 Mich App 379,390-391; 686 NW2d 16 (2004).

Courts have long recognized the rational basis standard applicable to review of local ordinances. In *Euclid v Amber Realty Co,* 272 US 365 (1926), the United States Supreme Court

upheld the validity of zoning as a legitimate use of police powers. The case established the historical "fairly debatable" test for reviewing substantive due process claims against local ordinances. Under the test, the court was to defer to local government if the purpose and means used to advance that purpose were at all reasonable or fairly debatable. This test grew into the now well-settled "rational relationship" or "rational basis" test used for adjudicating substantive due process claims. Michigan Courts have followed suit. *Schwartz v City of Flint*, 426 Mich 295; 395 NW2d 678 (1986); *Greater Bible Way Temple v Jackson*, 478 Mich 373; 733 NW2d 734 (2007); *Essexville v Carrollton Concrete*, 259 Mich App 257; 673 NW2d 815 (2003), *app den*, 470 Mich 864 (2004).

The ordinance at issue here is presumed to be constitutional and must only be "rationally related to a legitimate government interest." *Landon Holdings Inc v Grattan Township*, 257 Mich App 154, 173; 667 NW2d 93 (2003); *Norman Corp v City of East Tawas*, 263 Mich App 194, 201; 687 NW2d 861 (2004). Indeed, ordinances must be construed in a constitutional manner if possible. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

The substantive due process clause requires that the action by the local municipality not be unreasonable, arbitrary, or capricious, and that the means selected to accomplish the regulation bear a rational relationship to the governmental objectives sought to be achieved. *Kyser v Kasson Twp*, 486 Mich 514, 521; 786 NW2d 543 (2010). As noted in *Pearson v Grand Blanc Twp*, 961 F2d 1211 (6th Cir 1992), the Court's review of a substantive due process challenge differs based on whether the action involved is administrative or legislative. When *administrative* action is at issue, the action will be found to violate substantive due process only when it can properly be characterized as arbitrary and capricious, or "conscience-shocking", in the *strict* constitutional sense, meaning a *complete* lack rational basis for the action. *Pearson*

followed the fundamental principle in *Brae Burn* when it noted that federal Courts should not sit as "local boards of zoning appeals" and that the federal Court should "show great respect for the local authority's professional judgment". *Id.* at 1222. And, *Pearson* held that when legislative action is the subject of a substantive due process attack, the scope of review is *even more deferential* than for an administrative action. If ***any*** conceivable legitimate governmental interest supports the municipality's action, that action ***cannot*** offend substantive due process, i.e., the decision does not "shock the conscience." *Id. at* 1223. See, also, *Gustafson v City of Lake Angelus*, 76 F3d 778 (6th Cir 1996); *Mettler Walloon, LLC v Melrose Twp, 281 Mich App 184, 197; 761 NW2d 293 (2008); Richardson v Twp of Brady*, 218 F3d 508, 517-518 (6th Cir 2000); *Curto v City of Harper Woods*, 954 F2d 1237, 1243 (6th Cir 1992).

As confirmed in *Conlin v Scio Twp*, 262 Mich App 379, 686 NW2d 16 (2004):

> However, in *Muskegon Rental* [*v City of Muskegon,* 465 Mich 456; 636 NW2d 751 (2001)], our Supreme Court, quoting *TIG Insurance Inc v Dep't of Treasury*, 464 Mich 548, 557-558, 629 NW2d 402 (2001) stated:
>
> 'Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with mathematical nicety, or even whether it results in some inequity when put into practice.' [Citation omitted].
>
> Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass 'constitutional muster' if the legislative judgment is supported by any set of facts, either known or which could reasonable be assumed, even if such facts may be debatable. *Id.* at 259-260, 615 NW2d 218. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. [Citation omitted]. Thus, to have the legislation stricken, the challenger would have to show that the legislation is based 'solely on reasons totally unrelated to the pursuit of the state's goals'. [Citation omitted]. Or, in other words, the challenger must 'negate every conceivable basis which might support' the legislation. *Id.* at 390-391. (Emphasis added.)

As repeatedly stated by the courts, something far more than a legitimate difference of opinion must be proven. *Kropf v City of Sterling Heights*, 391 Mich at 162; *Bell River Associates*

v China Township, 233 Mich App 124; 565 NW2d 695 (1997); *Albright v City of Portage*, 188 Mich App 342, 352-353; 470 NW2d 657 (1991); *Houdek v Centerville Twp,* 276 Mich App 568, 583; 741 NW2d 587 (2007). The Court does "not consider the effects of the statute or its consequences, only its purpose." *People v Derror*, 475 Mich 316, 340; 715 NW2d 822 (2006).

3. BCO Section 18-59 is rationally related to a legitimate governmental interest.

> *"Thus, to have the legislation stricken, the challenger would have to show that the legislation is based 'solely on reasons totally unrelated to the pursuit of the state's goals'. Conlin v Scio Twp,* 262 Mich App 379, 391; 686 NW2d 16 (2004).

Plaintiffs have the burden of overcoming the presumption of constitutionality of BCO Section 18-59. Plaintiffs must prove affirmatively that the ordinance is arbitrary and capricious in the strict sense, meaning that the ordinance has absolutely no relationship to the public health, safety, and general welfare. *Lingle v Chevron USA, Inc*, 544 US 528, 541 (2005); *Pearson v Grand Blanc Township*, 961 F2d at 1222-1223; *Gustafson v City of Lake Angelus*, 76 F3d 778 (6th Cir 1996). Demolition is an appropriate remedy to abate several building code violations for the protection of the public health, safety, and welfare. *Charter Twp of Ypsilanti v Grove Home Improvement Ass'n*, unpublished per curium, Court of Appeals, Docket No. 305990, decided March 26, 2013. (Exhibit E).

There is no question that there are numerous and significant governmental interests being advanced by the ordinance. Protecting and promoting the public health, safety, and general welfare are legitimate government interests. *Square Lake Hills Condominium Ass'n v Bloomfield Township*, 437 Mich 310, 325; 471 NW2d 321, *reh den* 437 Mich 1280 (1991). Protecting aesthetic value is included in the concept of the general welfare. *Gackler Land Co Inc v Yankee Springs Twp*, 427 Mich 562, 572; 398 NW2d 393 (1986); *Norman Corporation v City of East Tawas,* 263 Mich App 194; 687 NW2d 861 (2004). Abatement of a nuisance,

including remedying a dangerous building situation, is a legitimate governmental interest. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 271-272; 761 NW2d 761 (2008). In fact, Plaintiffs did not contest the right of the City to demolish dangerous structures, and the majority of the Court of Appeals also confirmed the substantial governmental interest advanced by demolition of dangerous buildings. *Id.* at 708, 714-715. These interests are all furthered by the ordinance in question, and in many cases (maybe most) there is no room to debate that fact.

The State of Michigan has adopted the Stille-DeRossett-Hale Single State Construction Code Act, MCL 125.1501 *et seq.* Under the act, the state was required to promulgate a code to, among other things, ensure adequate maintenance of buildings and structures throughout the state to adequately protect the health, safety, and welfare of the people. MCL 125.1504(2)(e). Under the recognized Codes applied in the state, demolition of structures is permitted in situations where they are found to be dangerous, unsafe, unsanitary or unfit for human habitation. See, e.g., BOCA National Property Maintenance Code, PM-110.1[5]; International Property Maintenance Code, Section 110, Demolition.[6] Notably, the codes grant to the code official even further discretion and latitude in ordering a dangerous structure demolished; the code official can order the demolition if he/she finds the structure to be

[5] "PM-110.1 General: The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to raze and remove such structure; or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to raze and remove at the owner's option; or where there has been a cessation of normal construction of any structure for a period of more than two years, to raze and remove such structure."

[6] "110.0 General. The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to demolish and remove such structure; or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to demolish and remove at the owner's option; or where there has been a cessation of normal construction of any structure for a period of more than two years, to demolish and remove such structure."

dangerous and deems repairs unreasonable, regardless of the cost. BCO 18-59 is more stringent than state law; it requires the building official to find both that the structure is dangerous, and that the cost to repair exceeds 100% of the assessed value, setting a defined standard to be applied to govern the building official's actions in determining whether repairs are reasonable.

The State Housing Law, MCL 125.521, *et seq.*, is also implicated directly by the Court of Appeals ruling. Under that law, a hearing officer is charged with determining if a structure is dangerous—much like the way the Brighton City Manager did in this case. Under MCL 125.541, the building owner has a right to appeal to the legislative body (like the Brighton City Council). If the legislative body upholds the order of demolition, the owner must comply within 21 days. Importantly, "if the estimated cost of repair exceeds the state equalized value of the building or structure to be repaired, a ***rebuttable presumption*** that the building or structure requires immediate demolition exists." The SEV of a building or structure is 50% of its true cash value. The Brighton ordinance is thus more lenient than the Housing Law. Presumably, under the Court of Appeals' ruling here, this provision of the State Housing Law is now at issue as well. See also MCL 125.534, which similarly allows demolition of a dangerous building if the cost of repair exceeds the SEV—except where the building is in "core city," in which case it can actually be *less than* the SEV.

There is no question that significant and substantial governmental interests are advanced through demolition of dangerous buildings. Plaintiffs themselves did not contend that the City lacked the general authority to demolish unsafe or dangerous structures. *Id.* at 708. The majority of the Court of Appeals stated that "[w]e do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that objective can entail

demolishing or razing unsafe structures." *Id.* at 714-715. And, the governmental interest in the public health, safety and welfare through demolition of unsafe and dangerous buildings has been recognized by the State of Michigan in statutes (Housing Law; State Construction Act) and the various National Codes, applicable in this state. Even though it recognized these legitimate governmental interests, the majority of the Court of Appeals erred when it failed to uphold BCO 18-59 which bears more than a rational and reasonable relationship to the governmental objectives sought to be achieved.

C. BCO 18-59 is not unconstitutional on its face as a violation of procedural due process.

1. The Court of Appeals erred in finding a procedural due process violation when the Trial Court had not ruled on the issue, and the parties had not raised the issue in their briefs on appeal.

> "..... *there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right." Napier v Jacobs*, 429 Mich 222, 228-229; 414 NW2d 862 (1987).

Normally, the Supreme Court will not consider issues that were not raised both in the trial court and the Court of Appeals. *People v Smith*, 420 Mich 1, 11 n 3; 360 NW2d 841 (1984). See also, *In re Contempt of Barnett*, 233 Mich App 188, 191; 592 NW2d 431 (1998) (appellant waived issue raised for first time on appeal). An exception exists when review is necessary to prevent a "miscarriage of justice." In *Napier v Jacobs*, 429 Mich 222; 414 NW2d 862 (1987), the Supreme Court discussed the reasons for the "raise-or-waive" rule:

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was

> presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal." [*Napier, supra* at 227-229 quoting *State v. Applegate,* 591 P 2d 371, 373 (Or App, 1979).] Id., at 228-229.

Napier dealt with a challenge to the sufficiency of the evidence that had not been raised in the trial court. The *Napier* Court went on to consider the "raise-or-waive" rule in the case before it and whether its application would result in manifest injustice:

> The Court of Appeals acknowledged the general rule that an issue not properly raised at trial is waived, but then noted the exception that review is permissible "to prevent a miscarriage of justice." 145 Mich App at 290, 377 NW2d 879. Most jurisdictions recognize the authority of an appellate court to review an issue, even where the issue was not preserved, when some fundamental error would otherwise result in some egregious result. LaFave & Israel, *supra,* § 26.5(d). **This Court has ruled that such power of review is to be exercised quite sparingly**:
>
> "While this Court does have inherent power to review even if error has not been saved- *People v Dorrikas* (1958), 354 Mich 303 [92 NW2d 305]-such inherent power is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a [criminal] defendant a fair trial. There is nothing before us in this record to invoke such power." *People v. Farmer,* 380 Mich. 198, 208, 156 N.W.2d 504 (1968) (question of voluntariness of a defendant's confession waived by failure to raise it in pre-*Walker* trial).
>
> The instant case does not involve, for example, a criminal defendant faced with imprisonment who claims for the first time on appeal that the evidence at trial was insufficient to support the verdict.[FN2] Defendant raises no injustice other than the loss of a favorable jury verdict. While defendant asserts that manifest injustice and a miscarriage of justice would occur if appellate review of the sufficiency of the evidence were denied in the instant case, defendant fails to describe the nature of that injustice. More than the fact of the loss of the money judgment of $60,000 in this civil case is needed to show a miscarriage of justice or manifest injustice. Id., at 232-234. (Emphasis added).

Although the Trial Court did not decide the procedural due process claim, and neither party had briefed the claim in the Court of Appeals, the majority concluded that it could address the issue because "procedural due process principles are implicated and need to be examined and applied in order to properly resolve this appeal." *Id.* at 725. The dissent called the majority to task for this action, particularly considering the long-standing rule against addressing the merits of unbriefed issues. *Id.* at 733.

The majority of the Court of Appeals should not have raised and decided an issue that was not first decided by the Trial Court, and which the parties had not briefed on appeal. No manifest injustice would have occurred. In fact, addressing the procedural due process issue was totally unnecessary given that the majority had ruled in Plaintiff's failure on the substantive due process claim.

2. BCO 18-59 does not violate procedural due process on its face.

> *When an individual is deprived of a protected property or liberty interest, "procedural due process generally requires that the state provide a person with notice and an opportunity to be heard" before such a deprivation occurs. Braun v Ann Arbor Township,* 519 F3d 564 (6th Cir 2008), cert den 129 S Ct 628 (2008).

Procedural due process requires the government to provide notice and an opportunity for hearing before it can terminate a protected interest. *Board of Regents v Roht*, 408 US 564, 570 (1972); *Warren v City of Athens*, 411 F3d 697, 708 (6th Cir 2005). Essentially, procedural due process protects individuals against deficient procedures. *Mudge v Macomb County*, 458 Mich 87, 101; 580 NW2d 845 (1998). "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v Burch*, 494 US, 113, 125 (1990).

As stated in *Mettler Walloon LLC v Melrose Twp,* 281 Mich App 184, 213-214; 761 NW2d 293 (2007):

> Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property. (Citation omitted). Procedural due process generally requires notice, (citation omitted), and opportunity to be heard, (citation omitted), before an impartial trier of fact, (citation omitted), and a written, although relatively informal, statement of findings, (citation omitted). In other words, procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. (Citation omitted).

Plaintiffs were unquestionably afforded—and availed themselves of—procedural due process in this matter. Under BCO 18-59, the Building Official provided written notice to Plaintiffs that the structures in question were deemed to be unsafe structures under every element contained in BCO 18-46 and the International Fire Code.[7] In response, Plaintiffs appealed that decision to the Brighton City Council as permitted under BCO 18-61 on February 16, 2009. The hearing commenced on April 2, 2009, and continued on June 4th and 18th. On July 16, 2009, after four nights of hearings, the Brighton City Council passed a Resolution affirming the determination made by the Building Official that the structures were unsafe, and that the costs to repair the structures exceeded 100% of the true cash value of the structures, and that making repairs would be unreasonable. There is no dispute that Plaintiffs had notice of each of the hearings, and Plaintiffs were given the opportunity to appear and present evidence at every one of the hearings. This process, which spanned over a period of some five months, fully satisfied the requirements of procedural due process. And, the Plaintiffs have been given additional due process through the City's lawsuit to enforce the demolition order.

Despite this procedure, the majority of the Court of Appeals held:

[7] The structures would also be considered dangerous under the State Housing Law, MCL 125.539.

> Ultimately, we conclude that the ordinance infringes on plaintiff's due process rights, whether denominated procedural or substantive, thereby making it unnecessary to determine which due process principle is actually embodied in plaintiffs' argument. *Id.* at 710.

The majority did not dispute that Plaintiffs were afforded notice and the opportunity to be heard. Rather, the majority felt that the lines between substantive and procedural due process claims were "not always bright" (*Id.* at 710), and therefore, it could avoid making a determination as to what claim precisely applied. BCO 18-59 only contained a presumption that making repairs would be unreasonable, giving the Plaintiffs the opportunity to overcome or rebut that presumption. Although this was recognized by the majority, the majority nonetheless concluded:

> ... While police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe, the ordinance's exclusion of a repair option when repairs are deemed economically unreasonable bears no reasonable relationship to this legislative objective. Demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing procedural safeguards in the form of an option to repair when a property owner's desire to repair could be viewed as unreasonable and lead to the unlawful deprivation of a constitutionally protected property interest, and which safeguard would burden the city to a lesser extent that demolition, the city's ordinance also violates procedural due process. *Id.* at 731.

The holding of the majority expands the concept of procedural due process, which it distorts into a rule that is so flexible and undefined that the particular process that will be "due" in each situation can only be determined at the time of judicial review. Providing notice and an opportunity to be heard will apparently no longer be considered enough, leaving a municipal entity the task of determining in each particular situation what other "procedural safeguard" the court might later determine should have been afforded. The fundamental basis of procedural

due process is providing a mechanism that can be known by and followed by all. And that has long been recognized by the courts as being the requirement of notice and an opportunity to be heard.

The dissent aptly articulated the problem with the reasoning of the majority:

> ....the majority holds that the 'city should have also provided for a reasonable opportunity to repair and unsafe structure...'. This position is not sustainable. For one, the majority's focus is on the standards to be applied by the council (whether the council *must* allow a homeowner the option to repair when the cost exceeds 100 percent of the structure's value), as opposed to the *process* provided by the ordinance to persons who are contesting an inspector's decision. And, as set forth above, procedural due process is concerned only with the procedures employed by the government to allow the citizen to be heard before being deprived of his property. *Gorman v Univ of Rhode Island,* 837 F2d 7 (1st Cir 1988). *Id.* at 737.

The dissent pointed out that Plaintiffs had received notice from the Building Official, an opportunity to appeal that decision to City Council, hearings before the City Council by an impartial decision maker, and the opportunity to appear and present evidence. Under these circumstances, Plaintiff received all process that was constitutionally due.

The ordinance is presumed to be constitutional. In order to prove that an ordinance is facially unconstitutional, Plaintiffs were required to prove that the ordinance, on its face, lacked a constitutionally-sufficient process. BCO 18-46 contains the criteria to determine whether a structure is "unsafe".[8] Plaintiffs' structures met every one of the ten criteria in the ordinance. The Building Official then evaluated the extent of the unsafe and dangerous conditions and the cost to repair, and gathered the true cash value of the structures from assessing records. The Building Official determined that the costs to repair exceeded 100% of the true cash value. Accordingly, the Building Official provided written notice of this determination on January 30,

[8] Again, BCO 18-49 contains criteria that mirrors that contained in the State Housing Law, MCL 125.539; see, also, Property Maintenance Code, PM-108.1.1, PM-110.1; International Fire Code, Section 110.1.1 and 110.1.2.

2009, and advised Plaintiffs that that the structures were to be demolished. The letter further notified Plaintiffs that they had the right to appeal the Building Official's decision to the City Council under BCO 18-61.

Plaintiffs exercised their right to appeal to City Council, and hearings were conducted before the City Council on four nights expanding over a three month period. Plaintiffs were provided with notice of each of these hearings, and Plaintiffs and/or their representatives had the opportunity to, and did, appear and present evidence to the City Council. The City Council, weighing all the evidence presented, considered the credibility of the witnesses, affirmed the Building Official, and ordered demolition of the structures. This process fully satisfied the requirements of procedural due process, and met the policy of providing a meaningful opportunity for review.

The majority of the Court of Appeals has taken a well-defined cause of action and imposed an additional requirement to satisfy procedural due process in this case, and left open the door for further confusion in this area. The majority found that, although Plaintiffs were afforded notice and an opportunity to be heard before an impartial decision-maker, in this particular factual situation, a "repair option" was also required to satisfy procedural due process. This ruling is directly contrary to federal and state law. In effect, the majority's opinion could be interpreted to allow future courts to look at each case before it to determine whether another step might exist that could be added to the process which in that particular court's opinion would be "fair" under the circumstances.

Contrary to the majority's comment, it was necessary to determine which due process principle applied substantive or procedural. By failing to differentiate between the substantive and procedural claims, the majority of the Court of Appeals melded the two distinct claims, and blurred beyond recognition the lines between them. If the opinion is to stand, there will be

confusion moving forward on what elements need to be proven for the separate causes of action.

CONCLUSION

Amicus Curiae, Public Corporation Law Section of the State Bar of Michigan, respectfully requests this Honorable Court enter an order peremptorily reversing the Court of Appeals' decision.

Respectfully submitted,

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EXHIBIT A

ARTICLE III. UNSAFE STRUCTURES

Sec. 18-46. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Unsafe structure means a structure which has any of the following defects or is in any of the following conditions:

(1) A structure, because of dilapidation, decay, damage, faulty construction, or otherwise which is unsanitary or unfit for human use;

(2) A structure that has light, air, or sanitation facilities which are inadequate to protect the health, safety, or general welfare of those who live or may live within;

(3) A structure that has inadequate means of egress as required by this Code;

(4) A structure, or part thereof, which is likely to partially or entirely collapse, or some part of the foundation or underpinning is likely to fall or give way so as to injure persons or damage property;

(5) A structure that is in such a condition so as to constitute a nuisance, as defined by this Code;

(6) A structure that is hazardous to the safety, health, or general welfare of the people of the city by reason of inadequate maintenance, dilapidation, or abandonment;

(7) A structure that has become vacant, dilapidated, and open at door or window, leaving the interior of the structure exposed to the elements or accessible to entrance by trespassers or animals or open to casual entry;

(8) A structure that has settled to such an extent that walls or other structural portions have less resistance to winds than is required in the case of new construction by this Code;

(9) A structure that has been damaged by fire, wind, flood, or by any other cause to such an extent as to be dangerous to the life, safety, health, or general welfare of the people living in the city;

(10) A structure that has become damaged to such an extent that the cost of repair to place it in a safe, sound, and sanitary condition exceeds 50 percent of the assessed valuation of the structure, at the time when repairs are to be made.

(Ord. No. 307, § IX(104.1), 8-6-87)

Cross references: Definitions generally, § 1-2.

Sec. 18-47. Unlawful to occupy or maintain.

It shall be unlawful for an owner or agent to maintain or occupy an unsafe structure.

(Ord. No. 307, § IX(104.2), 8-6-87)

Sec. 18-48. Owner and occupants responsible for structure.

All persons or entities who own, manage, lease, rent, or occupy any structure shall be equally responsible for keeping the structure in a clean and habitable condition and shall take all necessary precautions to prevent any nuisance or other condition detrimental to public health, safety, or general welfare from arising thereon.

(Ord. No. 307, § IX(104.3), 8-6-87)

Sec. 18-49. Enforcing officers.

The city manager, or his designee, are empowered to perform the duties and functions and are given the authority of regularly authorized and appointed police officers of the city in the enforcement of the provisions of this article.

(Ord. No. 307, § IX(104.4), 8-6-87)

Sec. 18-50. Rules and regulations.

The city manager, or his designee, are authorized to prepare such reasonable rules and regulations as he deems necessary to carry out and enforce the provisions of this article.

(Ord. No. 307, § IX(104.5), 8-6-87)

Sec. 18-51. Right of entry.

The city manager, or his designee, shall have the right to enter private property at any reasonable hour of the day or night for the purpose of making a sanitary or health survey of the structure, obtaining a sample of water, collecting other data and material pertaining to public health, or enforcing the provisions of this Code. It shall be unlawful for any person to resist or attempt to prevent the city manager, or his designee, from carrying out the purposes of this section. The city manager, or his designee, shall have in their possession, while carrying out the duties outlined above, sufficient credentials identifying themselves. Such credentials shall be exhibited by the bearer on demand to any person in charge of the structure.

(Ord. No. 307, § IX(104.6), 8-6-87)

Sec. 18-52. Notice.

(a) The city manager, or his designee, shall issue a notice of unsafe structure when it is determined that the structure is unsafe.

(b) Service of the notice shall be made upon the owner or agent registered with the city and if not registered as indicated by the records of the city assessor by:

(1) Personally delivering a copy to the owner or agent;

(2) Mailing a copy by certified mail, postage prepaid, return receipt requested to the owner as indicated by the records of the city assessor and posting a copy of the notice upon a conspicuous part of the structure; or

(3) When service cannot be made by either of the above methods, by publishing the notice in a local newspaper of general circulation once a week for three consecutive weeks and by posting a copy of the notice upon a conspicuous part of the structure.

(c) The notice shall:

(1) Be in writing;

(2) Include a description of the real estate sufficient for identification;

(3) Specify the repairs and improvements required to be made to render the structure safe or if the city manager, or his designee, has determined the structure cannot be made safe, indicate that the structure is to be demolished;

(4) Specify a reasonable time within which the repairs and improvements must be made or the structure must be demolished;

(5) Include an explanation of the right to appeal the decision to the city council within ten calendar days of receipt of the notice in accordance with section 18-61;

(6) Include a statement that the recipient of the notice must notify the city manager within ten calendar days of receipt of the notice of his intent to accept or reject the terms of the notice.

(Ord. No. 307, § IX(104.7), 8-6-87)

Sec. 18-53. Placarding of structure.

If the owner or agent refuses to comply with the requirements set forth in the notice, the city manager shall cause to be posted at each entrance of the structure a placard bearing the words:

Do not enter. This Structure is Unsafe and its Use or Occupancy has been Prohibited by the City of Brighton.

(Ord. No. 307, § IX(104.8), 8-6-87)

Sec. 18-54. Removal of placard.

The city manager, or his designee, shall remove the placard whenever the structure has been made safe. It shall be unlawful for any person to deface or remove a placard without the approval of the city manager or his designee.

(Ord. No. 307, § IX(104.9), 8-6-87)

Sec. 18-55. Prohibited use.

It shall be unlawful for any person to occupy a placarded structure or part thereof, or for any owner or any person responsible for the structure to allow anyone to occupy the placarded structure.

(Ord. No. 307, § IX(104.10), 8-6-87)

Sec. 18-56. Emergency measures.

When in the opinion of the city manager, or his designee, there is an actual and immediate danger of failure or collapse of a structure or any part of a structure which would endanger life, or when any structure or part of a structure has fallen and life is endangered by the occupation of the structure, the city manager, or his designee, is hereby authorized and empowered to order and require the occupants to vacate the structure immediately and the provisions of this article relating to notice are not applicable. The city manager, or his designee, shall cause to be posted at each entrance to the structure a notice reading as follows:

Do not enter. This Building is Unsafe and its Use or Occupancy has been Prohibited by the City of Brighton.

(Ord. No. 307, § IX(104.11), 8-6-87)

Sec. 18-57. Temporary safeguards.

When, in the opinion of the city manager, or his designee, there is an actual and immediate danger of collapse or failure of a structure or any part of a structure which would endanger life, or when any structure or a part of a structure has fallen and life is endangered by the occupation of the structure, the city manager, or his designee, shall cause the necessary work to be done to make the structure or part of the structure temporarily safe, whether or not the legal proceedings herein described have been instituted. The cost of making the structure or any part of the structure temporarily safe shall be a lien against the real property and shall be reported to the city assessor, who shall assess the costs against the property on which the structure is located.

(Ord. No. 307, § IX(104.12), 8-6-87)

Sec. 18-58. Notice and order to show cause.

(a) If an owner or agent fails to comply with the requirements set forth in the notice issued in accordance with section 18-52, the city manager, or his designee, shall serve a notice and order to show cause upon the owner or agent of the structure that is registered with the city and if not registered as indicated by the records of the city assessor. The notice and order to show cause shall be served in the same manner as provided in section 18-52 and shall be served not less than seven calendar days prior to the show cause hearing. The notice shall:

(1) Specify the conditions making the structure unsafe;

(2) Specify the action necessary to alleviate the unsafe condition;

(3) Specify the time and place of the show cause hearing; and

(4) Advise the owner or agent that he shall have the opportunity at the public hearing to present testimony and evidence to show cause why the structure should not be demolished or otherwise made safe as recommended by the city manager, or his designee.

(b) The show cause hearing shall be conducted by the city council and shall be at a regularly scheduled meeting of the council.

(Ord. No. 307, § IX(104.13), 8-6-87)

Sec. 18-59. Unreasonable repairs.

Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city

assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair. This section is not meant to apply to those situations where a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God. If a structure has become unsafe because of an event beyond the control of the owner, the owner shall be given by the city manager, or his designee, reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair. If the owner does not make the repairs within the designated time period, then the structure may be ordered demolished without option on the part of the owner to repair. The cost of demolishing the structure shall be a lien against the real property and shall be reported to the city assessor, who shall assess the cost against the property on which the structure is located.

(Ord. No. 307, § IX(104.14), 8-6-87)

Sec. 18-60. Restoration.

A structure deemed to be unsafe may be restored to a safe condition provided a change of use or occupancy is not contemplated or compelled by reason of such reconstruction or restoration. If the damage or cost of reconstruction or restoration is in excess of 50 percent of the structure's assessed value, exclusive of foundations, such structure shall be made to comply with the requirements for materials and methods of construction of structures hereafter erected.

(Ord. No. 307, § IX(104.15), 8-6-87)

Sec. 18-61. Appeal to city council.

An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal. The appeal must be filed within ten calendar days from receipt of the notice of unsafe structure if the notice was served personally or by mail and ten calendar days from the date of the last publication if served by publication. The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

(Ord. No. 307, § IX(104.16), 8-6-87)

Sec. 18-62. Commencement of legal proceedings.

If the owner or his agent refuses to abide by the requirements set forth in the notice of unsafe structure or the notice and order to show cause or refuses to abide by the decision of the city council rendered at the show cause hearing, or on appeal, the city council may, by resolution, authorize the city attorney's office to initiate the appropriate legal proceedings.

(Ord. No. 307, § IX(104.17), 8-6-87)

Sec. 18-63. Appeal to circuit court.

An owner aggrieved by any final decision of the city council may appeal the decision to the county circuit court by filing a complaint within 20 calendar days from the date of the decision.

(Ord. No. 307, § IX(104.18), 8-6-87)

Sec. 18-64. Penalties and remedies.

(a) Any person who shall violate any provision of this article shall be punished as provided by section 1-16 of this Code.

(b) Any person guilty of violation of this article shall also be subject to civil proceedings for damages and/or injunctive relief by the city or by any person or entity injured or damaged by such violation. Commencement of any such proceedings shall not constitute an election of remedies.

(c) Each day that a violation continues to exist shall constitute a separate offense.

(Ord. No. 307, § IX(104.19), 8-6-87)

Secs. 18-65—18-75. Reserved.

EXHIBIT B

Article 4. B-4 Downtown Business District

Sec. 5-310. Reserved. (Code of 2001)

Sec. 5-320. Purpose.

The City recognizes the downtown commercial area of New Brighton as a unique situation in that the area was developed in a manner that is now inconsistent with present zoning code requirements. Further the nature of development in the downtown commercial area and certain zoning code requirements inhibit new development, redevelopment, or expansion of existing businesses. In order to facilitate such activity in the downtown commercial area, to recognize the unique character and circumstances of such an area, and to create a harmonious pattern and attractive development benefitting the downtown commercial area in particular and the City as a whole, a B-4 Downtown Business District is created. (Code of 1988; Code of 2001)

Sec. 5-330. Designation of a B-4 Downtown Business District.

(1) By ordinance, the City Council may designate a parcel or parcels of land as a B-4 Downtown Business District after the Planning Commission has completed a review and held a public hearing. Notice of the hearing shall be given in the same manner as specified in Section 8-620 of the Zoning Code. (Code of 1988, Ord. No. 690, 7-24-01; Code of 2001)

(2) Action to designate a B-4 Downtown Business District may be initiated by the City Council or by petition of fifty percent or more of the property owners within the proposed district. (Code of 2001)

Sec. 5-340. Uses Permitted in a B-4 Downtown Business District.

(1) Commercial uses as listed in Section 5-220.

(2) All residential uses.

(3) Light industrial uses that are determined by the City Council to be in scale with and that have physical appearance, character, and environmental effects similar to commercial uses permitted in the District. Such uses must be permitted uses in the I-1 Light Industrial District and may be permitted at the discretion of the City Council pursuant to and in accordance with Sections 8-700 through 8-720 of the Zoning Code.

(4) Uses listed in Section 5-240 shall be allowed within a B-4 Downtown Business District upon issuance of a special use permit. (Code of 1988; Ord. No. 587, 11-10-92; Code of 2001)

(5) At the time of rezoning land to B-4 Downtown Business District, the City Council may, by ordinance, restrict or expand the uses listed in this section, taking into consideration the land being rezoned, the uses in the vicinity of the land, and any specific development proposals made and approved in connection with the rezoning. (Code of 1988:Code of 2001 Ord. No. 690, 7-24-01)

Sec. 5-350. General Development Plans in a B-4 Downtown Business District.

(1) The Council shall approve a general development plan within the B-4 Downtown Business District.

(2) Such plans shall contain the following information:

A. Location and configuration of proposed buildings.

B. Location and size of public and/or private parking areas, streets or ways to serve existing or proposed development.

C. Special architectural or design regulations to control development in the District.

D. Special signing regulations to control District signing.

E. Any proposed limitations on the use and development of properties in the District. (Code of 1988:Code of 2001 Ord. No. 690, 7-24-01)

(3) In approving a general development plan, the City Council may attach such conditions as it deems necessary to protect the public health, safety, and welfare, or to better carry out the stated purposes of this Chapter of the Zoning Code, and may require that such conditions be set forth in covenants regulating the use and development of properties in the District.
(Code of 1988: Code of 2001 Ord. No. 690, 7-24-01)

(4) Approval shall only be granted after review by the Planning Commission at a public hearing and action by the City Council. Approval of a general development plan shall require two-thirds vote of all the members of the City Council.(Code of 1988,Code of 2001 Ord. No. 690,7-24-01)

(5) Notice of the hearing shall be given in the same manner as specified in Section 8-620. (Code of 2001)

Sec. 5-360. Development Regulations in a B-4 Downtown Business District.

(1)Within a B-4 District there shall be no construction or expansion of buildings or structures nor expansion of any existing land use that is not consistent with the General Development Plan without obtaining an amendment to the general development plan for such construction or expansion. The construction or expansion must be in general compliance with the comprehensive plan for the City. (Code of 1988: Code of 2001 Ord. No. 690, 7-24-01)

(2) Application for amendments required herein shall include the submission of detailed site and development plans for development of all or an appropriate portion of the site. Plans shall be submitted in accordance with the terms of Section 8-010 of the Zoning Code except that the City may exempt an applicant from providing some of the information in cases involving expansion of existing buildings or land uses when such information would not be necessary to establish the effects of the proposal on surrounding properties or to establish compliance with approved plans.
(Code of 1988: Code of 2001 Ord. No. 690, 7-24-01)

(3) The procedure for consideration of an amendment shall be the same as that for a special use permit as specified in Section 8-120 except that approval requires a two-thirds vote of the entire Council. (Code of 1988: Code of 2001 Ord. No. 690, 7-24-01)

(4) Commercial and industrial uses within a B-4 Downtown Development District shall comply with all development regulations applicable in the B-3, General Business District, except as modified by the approved general development plan for the District or by the terms of conditions imposed by the Council for a specific development. (Code of 1988: Code of 2001 Ord. No. 690, 7-24-01)

(5)Residential uses within a B-4 Downtown Development District shall comply with all development regulations applicable in the R-3B, Multiple-Family Residence District, except as modified by the approved general development plan for the District or by the terms of conditions imposed by the Council for the specific development. (Code of 2001, Ord. No.690, 7-24-01)

EXHIBIT C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

LEON V. BONNER and
MARILYN E. BONNER,
Plaintiffs/Counter-Defendants,

v.

CITY OF BRIGHTON,
Defendants/Counter-Plaintiffs,
_____/

Case No. 09-24680-CZ

Consolidated with:
Case No. 09-24900-CZ

Hon. Michael P. Hatty

OPINION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 23 day of November, 2010.

The parties appeared before this Court on October 28, 2010 on the plaintiffs', Leon and Marilyn Bonners', motion for summary disposition. The Court indicated that due to the complexity of the issues presented and the likelihood of appeal of this Court's decision, the Court would take the matter under advisement and issue a written opinion. Consequently, the Court offers the following opinion as its decision on the Bonners' motion and determines that the Bonners' motion is GRANTED IN PART and DENIED IN PART as follows.

I. Statement of Facts

This action involves residential structures located at 116 East North Street and 122 East North Street in Brighton owned by the plaintiffs, Leon and Marilyn Bonner. On January 29, 2009, defendant City of Brighton's Building Official James Rowell sent the Bonners letters that the residential structures were to be demolished due to the structures having been deemed unsafe under Brighton Ordinances and since it had been determined that the cost of repairs exceeded the true cash value of the properties. The Bonners appealed this determination. At an appeal hearing

on April 2, 2009, the Bonners agreed to allow the City access to the structures for an inspection. The Bonners thereafter refused access prompting City to obtain an administrative search warrant on April 29, 2009. The City of Brighton ("the City") executed the search on May 27, 2009 with the City's representatives as well as several tradesmen. Reports and affidavits were prepared along with repair estimates and were presented to the Brighton City Council on June 4, 2009 and June 18, 2009. The Bonners also presented evidence at those hearings. The Council passed a resolution on July 16, 2009 affirming the Building Official's determination and ordered demolition within 60 days—i.e. by September 14, 2009.

During the initial appeal process of the demolition letter, the Bonners began roof repairs until a stop work order was issued. The Bonners applied for and were denied a permit for these repairs. The Bonners appealed that denial to the Board of Appeals and filed a Writ of Mandamus action in this Court under file number 09-24629-CZ, which was dismissed on August 20, 2009 for failure to exhaust administrative remedies since the Board of Appeals decision from July 16, 2009 had not been finalized. The Board of Appeals issued a resolution affirming the denial on August 27, 2009, and the Board finalized its decision at a November 16, 2009 meeting. The Bonners filed this complaint in this case, case number 09-24680-CZ, alleging four federal constitutional claims under 42 U.S.C. 1983 for Violation of Procedural Due Process, Violation of Substantive Due Process, Violation of Equal Protection, and Inverse Condemnation/Regulatory Takings, and three state law claims for Contempt of Court, Slander of Title, and Violation of MCL 125.540.

On March 12, 2010, the Court first heard arguments on the City's motion for partial summary disposition under MCR 2.116(C)(8), and the Bonners also filed a motion for partial summary disposition and request for declaratory relief under MCR 2.116(C)(10). The Court entered an Order on March 12, 2010 granting the City's motion for summary disposition and

dismissing the Bonners' contempt of court and slander of title claims and restricting their state constitutional court claims. The Bonners also agreed that their claim under MCL 125.540 was withdrawn because the act was inapplicable to the City due to the size of the City's population. The Court took the Bonners' motion under advisement. Further, the Court heard testimony on the City's request for a preliminary injunction over the course of four days, beginning on March 12, 2010 and continuing on April 7, June 18, and June 23. The Court then requested written closing arguments from the parties together with findings of fact and conclusions of law. The Court received these from the parties in early August. On September 13, 2010, the Court issued two separate opinions, one denying the City's request for a preliminary injunction as essentially asking for relief that was improper on a request for a preliminary injunction and another denying the Bonners' motion for summary disposition on procedural grounds. Following that ruling, the Bonners again moved for summary disposition under MCR 2.116(C)(10), which is the present motion before the Court.

II. Standard of Review

Under MCR 2.116(C)(10), summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Lugo v Ameritech Corp,* 464 Mich 512, 520; 629 NW2d 384 (2001). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals,* 205 Mich App 418, 420; 522 NW2d 335 (1994). If the moving party's initial burden is met, then "[t]he opposing party must set forth specific facts, by affidavit or documentary evidence, showing that there are genuine issues for trial, and may not rest upon mere allegations or denials in the pleading." *Johnson v Wayne Co,* 213 Mich App 143, 139; 540 NW2d 66 (1983). "A genuine issue of

material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Additionally, "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

III. Analysis

The Bonners' motion for summary disposition presents several constitutional questions for the Court's review as well as a single non-constitutional question concerning whether the City's ordinances themselves require providing property owners an opportunity to repair their property prior to demolition. The Court will address each of the arguments in turn.

a. Bonners' Claims of Ordinance Violations

The Bonners have alleged that the City has failed to follow its own ordinances by ordering demolition without the option to repair under Section 18-59. "Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question, *see Ashwander v TVA*, 297 US 288, 345-348 (1936) (Brandeis, J., concurring), the Court should answer the [ordinance] questions first." *Steel Co v Citizens for a Better Environment*, 523 US 83, 112 (1998) (Stevens, J. Concurring). The Bonners argue that Section 18-52 requires a determination to be made by the building official that the building cannot be repaired which they claim did not occur in this case. The Bonners additionally argue that Section 18-60 of the City code of ordinances and Section 110.1 of the International Property Maintenance Code, which is adopted into the City's ordinance under Section 18-76 and modified under 18-77, permit unsafe structures to be repaired but the City has failed to allow such repairs.

i. Standards for Construction of Ordinances

The Bonners' arguments present questions about the construction of the City's

ordinances. The rules applicable to the construction of statutes apply equally to ordinances. *Tower Realty, Inc v City of East Detroit*, 196 F2d 710 (6th Cir 1952). Words and phrases in a statute are read in the context of the act as a whole to harmonize their meanings and give effect to the entire act. *Cairns v City of East Lansing*, 275 Mich App 102; 738 NW2d 246 (2007). The construction of statutes sharing a common purpose or relating to the same subject should effectuate each statute without repugnancy, absurdity, or unreasonableness. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999).

ii. Determination of Buildings as Unsafe Structure

The Bonners first argue that the City failed to comply with Section 18-52(c)(3) concerning the notice given for buildings that are deemed to be unsafe structures. Section 18-52(c)(3) states that the notice deeming the buildings unsafe structures shall: "Specify the repairs and improvements required to be made to render the structure safe or if the city manager, or his designee, has determined the structure cannot be made safe, indicate that the structure is to be demolished." In other words, Section 18-52 acknowledges that the city manager may order the home to be demolished if he or "his designee" determines that the structure cannot be made safe. The Bonners, however, take issue with the requirement that the city manager or his designee must determine that the structure cannot be made safe. The Bonners state that the building official "simply decided that in his opinion (without ever having been in the homes) that it would cost too much to make them safe."

This provision of the ordinance does not provide a specific standard for making the determination that the building cannot be made safe and does not provide substantive standards for judging the official's determination. Section 18-52(c) is nothing more than a list of what contents must be in a notice; it is not a substantive regulation but a procedural rule by which the sufficiency of the notice of an unsafe structure given by the City may be judged. Section 18-

52(c)(3) merely requires that when the manager has determined that the building cannot be made safe, the notice shall notify the owner that the building is to be demolished. There is no doubt from the evidence available to the Court on this motion that this requirement was complied with. Therefore, the Bonners argument as to this alleged deficiency is without merit.

iii. Opportunity to Repair Under Sections 18-60, 18-76, and 18-77

The Bonners further claim that two ordinances allow for the repair of unsafe structures and that by ordering the homes demolished, the City has failed to comply with its own ordinances which requires them to give the Bonners an opportunity to repair. Section 18-60 states, "[a] structure deemed to be unsafe may be restored to a safe condition provided a change of use or occupancy is not contemplated or compelled by reason of such reconstruction or restoration." Further, Section 18-76 adopts the International Property Maintenance Code ("IPMC"), and in Section 18-77 of the City's Ordinances, the code amends a provision of the IPMC and provides as follows:

> "*Section 110.1 General.* The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, as defined in Section 18-59 of the Brighton City Ordinances, to demolish and remove such structure; or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to demolish and remove at the owner's option; or where there has been a cessation of normal construction of any structure for a period of more than two years, to demolish and remove such structure."

The Bonners claim that under either of these ordinances, the City must provide the property owner the opportunity to repair without regards to the cost of repairs.

The sections referenced both provide for the repair of unsafe ordinances, but neither unequivocally contradicts Section 18-59's provision that if the costs of repair exceed 100 percent of the assessed value of the home then the City may order the buildings demolished without an option to repair. In fact, Section 110.1 of the IPMC under Section 18-77 of the City Code of

Ordinances references the City's right to demolish where "it is unreasonable to repair the structure, as defined in Section 18-59 . . ." just prior to the clause providing for repairs when "such structure is capable of being made safe by repairs . . ." Section 18-77 was adopted by the City in November 2006, and the City's insertion of the language concerning demolition under Section 18-59 modifies the standard IPMC provision. *See* 2006 International Property Maintenance Code, §110.1. Because it is obvious that the City amended Section 110.1 mindful of Section 18-59, Section 18-77 may not be read so as to contradict the demolition standard of Section 18-59. *Cairns*, 275 Mich App at 107 (noting "words and phrases in a statute are read in the context of the act as a whole to harmonize their meanings and give effect to the entire act."). Similarly, Section 18-60, which immediately follows Section 18-59 in the Code and was adopted by the City at the same time as Section 18-59 cannot be read to render the cost provision of Section 18-59 nugatory. *Id.*; *Omne Financial, Inc.*, 460 Mich at 312. Accordingly, the Bonners' claims that the City has violated its own ordinances are unmeritorious.

b. Bonners' Challenge to Section 18-59 Under Due Process Clause

The Bonners have also challenged a Section of the City's Code of Ordinances, arguing that Section 18-59 violates the Due Process clause of the 14th Amendment to the Federal Constitution. "The essence of a claim of violation of *substantive* due process is *that* the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). A party who challenges the legitimacy of an ordinance on the basis of due process "carr[ies] the burden of overcoming the presumption of constitutionality and must prove either that no public purpose is served by the act or that no reasonable relationship exists between the remedy adopted and the public purpose sought to be achieved." *Van Slooten v Larsen*, 410 Mich 21, 43; 299 NW2d 704 (1980); *Moore v City of Detroit*, 159 Mich App 199, 206; 406 NW2d 388 (1987). Further, "[t]he

presumption of constitutionality favors validity and if the relationship between the statute and public welfare is debatable, the legislative judgment must be accepted." *Van Slooten,* 410 Mich at 43. "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice. *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose." *Conlin v Scio Tp*, 262 Mich App 379, 389; 686 NW2d 16, 23 (2004).

The challenged ordinance provides that the City may demolish a building without providing the owner the option to repair the property in order to remedy the hazard and avoid demolition where it is determined that the costs of repairs exceed the value of the property on the City's tax rolls. Specifically, §18-59 states:

> "Whenever the City Manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the City Assessment Tax Rolls in effect prior to the building becoming an unsafe structure, *such repairs shall be presumed unreasonable, and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.*" (emphasis supplied).

The Bonners argue that the ordinance is unconstitutional because it withholds from the property owners the opportunity to repair the property, which does not advance any rational interest and therefore violates due process. The Court agrees and finds that the provision withholding the opportunity to repair serves no rational purpose and shocks the conscience.

Two rationales for this provision of the ordinance have been proffered, but neither the proffered rationales nor any other conceived of by this Court can support the contested provision of this ordinance. The City argues that there is a legitimate interest advanced by the ordinance because the demolition of unsafe buildings promotes the public safety. Certainly, the demolition

of unsafe structures promotes the legitimate interest of public safety. However, public health and safety is not advanced any more by the provision denying property owners an opportunity to repair than the interest in public health and safety would be advanced if the ordinance required the City to permit a reasonable opportunity to make such repairs. If an owner voluntarily repairs the home and brings it up to code, then the property is no longer a public health and safety hazard. Therefore, the interest is no more advanced if the property is demolished by the City than if the property is repaired by the owner to the City's standards. Because due process demands that "the means selected shall have a real and substantial relation to the object sought to be attained," *McAvoy v HB Sherman Co*, 401 Mich 419, 435-436; 258 NW2d 414 (1977), and withholding from the owner the option to repair does not advance the proffered interest any more than permitting the owner to repair it themselves, there is not a rational basis for the requirement and the deprivation of a property owner's interest in a building by the demolition of that building without the option of repair is entirely arbitrary such that it shocks the Court's conscience.

The City also stated at oral argument on the Bonners' first motion, however, that if the property owner is given an opportunity to repair buildings that qualify for demolition then the buildings will remain a hazard throughout the course of prolonged disputes between the City and property owners about whether the repairs done are sufficient or not. The City's argument in this respect still does not amount to a rational interest justifying this particular aspect of the ordinance. For this Court or any other to state that the ordinance is unconstitutional for failing to provide a reasonable option to repair is not to imply that the City is required to let the property fester in disrepair interminably. To the contrary, various decisions by other courts have distinguished the authority cited above and held ordinances constitutional after finding that a reasonable opportunity to make repairs had been granted. *See, e.g., Village of Lake Villa v Stokovich*, 211 Ill2d 106; 810 NE2d 13 (2004) (upholding an ordinance providing a 15-day

notice to repair or demolish before the municipality could demolish buildings). The deficiency with the ordinance in this case is that it provides *zero* opportunity for a property owner to make repairs not that it does not permit a property owner an opportunity for unending evasion of an inevitable demolition, and this rationale offered by the City similarly fails. The Court acknowledges that a party challenging an ordinance must negate every conceivable basis supporting it; however, beyond the reasons already discussed, the Court cannot conceive of any reasonable basis for withholding from a property owner the opportunity to repair a hazard in order to avoid demolition. *Conlin*, 262 Mich App at 391 (citing *Lehmhausen v Lake Shore Auto Parts Co*, 410 US 356, 364 (1973)). Accordingly, there is no rational interest advanced by withholding an opportunity to repair the property, and this provision of the ordinance violates due process.

The Court's conclusion that the ordinances' withholding from a property owner an opportunity to repair is arbitrary and violates due process is also supported by public policy embodied in case law of this state that has held that a reasonable opportunity to repair does not inhibit a municipality's ability to protect public health and safety. For instance, although it has been determined that the housing laws of MCL 125.401, *et seq.*, do not apply because the City of Brighton did not as of the last census have a population greater than 10,000, the Michigan Court of Appeals has held that the Michigan housing laws require giving property owners an opportunity to repair their property prior to demolitions conducted for safety reasons. *Florio v Chernick*, 45 Mich App 237, 240; 206 NW2d 538 (1973) (holding that "[u]nder the act, the determination to repair the buildings to comply with the Code or remove them is for" the property owner and not for the city's director for the enforcement of the housing code or the Court); 4 Mich Civ Jur Buildings §18 (2010) ("When demolition is threatened, property owners must be given an opportunity to obtain building permits and a reasonable time for the completion

of repairs and inspection"). Similarly, the Michigan Supreme Court in the context of a statute dealing with fire hazards admonished that demolitions "must be administered with caution" and, noting that "[t]he remedy prescribed should be no greater than is necessary to achieve the desired result," held that the trial courts must provide a property owner a reasonable opportunity to repair the property prior to demolition. *Childs v Anderson*, 344 Mich 90, 95-96; 73 NW2d 280 (1955). Thus, there is clearly support in Michigan law for the proposition that an opportunity to repair a building prior to demolition does not inhibit a municipality's interest in public health and safety.

Moreover, as the Bonners point out, an abundance of persuasive authority has held that identical ordinances that similarly withheld an option to repair advanced no rational purpose or were otherwise arbitrary. *See, e.g., Herrit v Code Mgmt Appeal Bd of the City of Butler*, 704 A2d 186 (Penn Commonwealth Ct 1997) (holding that an ordinance requiring demolition without providing the property owner the opportunity to repair was "not rationally related to the public health, safety or general welfare because there is no rational reason for the City . . . not to allow a property owner the ability to abate a nuisance on his/her property"); *Washington v City of Winchester*, 861 SW2d 125 (Ky Ct App 1993) (stating in the context of an ordinance with operative language that is very similar to the City's in this case that "just as the cost of such compliance is a property owner's problem, the method of compliance is also the property owner's decision. It's his/her money and far be it from the City to say how a reasonable person should spend his/her money."); *Horton v Gulledge*, 277 NC 353; 177 SE2d 885 (1970) (holding that "[t]o require [a building's] destruction, without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare, is arbitrary and unreasonable."); *Hawthorne Savings & Loan Ass'n v City of Signal Hill*, 19 Cal App 4th 148; 23 Cal Rptr 2d 272 (1993) (noting that codified California law requires the opportunity to repair as an option to avoid demolition); *Shaffer v City of Atlanta*, 223 Ga 249; 154 SE 241 (1967)

(finding that an ordinance withholding the option to repair "by thus placing [the owner] in a position of demolishing the property as his only means of abating the alleged nuisance is unconstitutional, null and void."); *Johnson v City of Paducah*, 512 SW2d 514 (Ky 1974) (holding under similar facts that "the owner should be afforded a reasonable time to repair his property so as to comply with the building code requirements if he so desires, unless there is present an imminent and immediate threat to the safety of persons or other property," and refusing to afford such opportunity is unconstitutional under state constitution provision akin to the Due Process clause). There is thus substantial persuasive and confirmatory legal authority for this Court's reasoning.

In contrast, the only case law that has been cited by the City is not on point. The case of *Bolden v City of Topeka*, 546 F Supp 2d 1210 (D Kan 2008) did not involve a due process challenge on the basis of an opportunity to repair a property but a challenge to the basis for selecting the formula used for determining that a property was eligible for demolition. The case thus does not address the issue at hand, namely whether an ordinance violates due process it fails to provide any option to the property owner to repair the building in lieu of demolition. Although the plaintiff in that case attempted to raise the pertinent issue on appeal, the U.S. Court of Appeals for the Tenth Circuit found that the issue was not properly before the Court of Appeals, stating that it had not been preserved in the trial court—i.e. it was not addressed in the District Court opinion that is now cited and relied on by the City. *See Bolden v City of Topeka*, 327 Fed Appx 58, 59 (10th Cir 2009). Therefore, the *Bolden* case does not alter this Court's conclusion that the deprivation of a home-owner's interest in his property without the option to repair lacks any rational basis. Consequently, for the reasons already given, the Bonners are entitled to summary disposition on this claim, and the Court declares that Section 18-59 is unconstitutional because it withholds from the property owners the opportunity to repair. Because Section 18-59

is unconstitutional, the demolition order that was issued on January 29, 2009 is also invalid, and the Court enjoins the scheduled demolition. Further, the City must cure this defect in the ordinance and must reissue a new demolition order under the revised ordinance before proceeding with any demolition of the properties.

c. Bonners' Challenge to Section 18-59 as Improper Delegation of Legislative Authority

The Bonners also argue that Section 18-59 is unconstitutional by providing an improper delegation of legislative authority, relying on *City of Saginaw v Budd*, 381 Mich 173; 160 NW2d 906 (1968). The Court disagrees. Under *Budd* the question for the Michigan Supreme Court was whether the City of Saginaw's ordinance was constitutional, which permitted the demolition of

> "[a]ll buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment as specified in this code or in any other effective ordinance . . ." *Id.* at 176-177.

The City committed to a building inspector the enforcement of the ordinance. The defendants, Harry and Blanche Budd, challenged the statute as an improper use of the police powers and an unconstitutional delegation of legislative authority to an administrative official without definable standards. *Id.* at 177. The Michigan Supreme Court held that "[t]he ordinance discloses that there was an improper delegation of authority without definable standards—a greater delegation of authority without definable standards than delegations we have passed judgment upon and have declared unconstitutional in previous opinions," and the Court therefore declared the ordinance unconstitutional. *Id.* at 178.

The *Budd* decision is inapposite to the case at hand. The question in *Budd* concerning the improper delegation of legislative authority without definable standards is grounded in concerns for separation of powers and due process. *See Westervelt v Natural Resources Comm'n*, 402

Mich 412, 437-437; 263 NW2d 564 (1978). The key requirement for a statute or ordinance that will be executed by an administrative official is that "the standards prescribed for guidance are as reasonably precise as the subject-matter requires or permits." *Osius v City of St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956).

Section 18-59 does not improperly delegate legislative authority to an administrative official without definable standards. In stark contrast to the facts of *Budd*, the City of Brighton's unsafe building ordinance in Section 18-59 provides a clear question for the determination of what constitutes an unsafe structure, requiring the building officials to determine "the costs of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure . . ." Unlike the ordinance in *Budd* which left unbridled discretion to the building official to make the call on what was "structurally unsafe" or "dilapidated," this standard permits a determination to be made within prescribed boundaries and with reasonable certainty. The standard in Section 18-59 is as "reasonably precise as the subject matter requires or permits." *Osius*, 344 Mich at 698. Further, the Bonners appear to argue that the ordinance improperly delegates authority because Jim Rowell, the building inspector, did not properly inspect the buildings before making his decision that the standard in Section 18-59 was satisfied. This argument is without merit, since however Jim Rowell made the determination in the present case has no bearing on whether the ordinance is facially constitutional. There is no defect with this portion of the ordinance. Therefore, the Bonners challenge to the ordinance in this respect lacks merit.

d. Bonners' Challenge to Section 18-59 Under Takings Clauses

The Bonners also allege violation of the Takings Clause of the U.S. Constitution and the

Michigan Constitution Article 10, § 2,[1] and assert a facial challenge to the ordinance, Plaintiff's First Amended Verified Complaint, ¶155, as well as a claim that the demolition order at issue constitutes a taking. *Id.* at ¶164, 166. The Bonners summarily allege that Section 18-59 is unconstitutional as it violates the state and federal constitutional provisions prohibiting the taking of private property without just compensation. The City in response argues that demolishing these homes would be abating a nuisance, and the abatement of a nuisance is not a taking. The Bonners cite a plethora of case summaries in support of their takings argument, only one of which, *Johnson v City of Paducah*, 512 SW2d 514 (Ky 1974), appears to tangentially address takings. However, even *Johnson* does not involve either the Michigan or Federal constitutional standards regarding takings as the case concerned whether an ordinance violated Section 2 of the Kentucky Constitution, which is more closely akin to the due process question addressed above. In other words, the Bonners have failed to cite any applicable law for this proposition.

Looking to the applicable law, the City is correct in its argument that abating a nuisance does not constitute a taking within the meaning of either constitutional provision. The U.S. Supreme Court admits a "nuisance" exception to the Takings Clause and has found that no compensation is required when the government abates a nuisance because "the State has not 'taken' anything when it asserts its power to enjoin nuisance-like activity." *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 491 n 20 (1987). Thus, under both the Michigan and Federal constitutional provisions proscribing takings without compensation, Michigan law holds that if a City "was exercising its legitimate police power to abate the public nuisance on defendant's property, no unconstitutional taking occurred." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008). Accordingly, the City is entitled to abate nuisances,

[1] Article 10, § 2 of the Michigan Constitution has generally been interpreted to be coextensive with the Takings Clause of the 5th Amendment to the U.S. Constitution. *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 184 n 10; 521 NW2d 499 (1994).

including by demolishing unsafe structures, and doing so does not constitute an unconstitutional taking. *See also, Stewart v City of Lansing*, No 1:08-cv-778, 2009 WL 910810, at *4-5 (WD Mich Apr 2, 2009). Therefore, since success on a facial challenge to an ordinance requires the party challenging the ordinance to demonstrate that there is no set of circumstances in which the ordinance would be valid, *Hendee v Putnam Tp*, 486 Mich 556, 568 n 17; 786 NW2d 521 (2010), and Section 18-59 could be validly applied in a variety of circumstances where there exists a nuisance on the property involved, the Bonners' facial challenge to the ordinance lacks merit.

As applied to the facts of this case, whether the demolition order is an unconstitutional taking is unclear. The City may not lawfully demolish the Bonners' homes unless it is determined that the homes constitute nuisances. The City contends that because the buildings violate the unsafe structures ordinance, they fit within this nuisance exception, but "the mere fact that a condition constitutes a violation of a local ordinance does not make that condition a public nuisance, and the circuit court has no jurisdiction to abate or enjoin such a condition unless it is independently established that the condition constitutes a nuisance." *Kircher*, 281 Mich App at 277-278. It is true that the violation of a zoning ordinance constitutes a nuisance per se. *Independence Twp v Skibowski*, 136 Mich App 178; 355 NW2d 903 (1984). Nonetheless, the ordinance at issue is not a "zoning" ordinance, as it was not enacted under the Michigan Zoning Enabling Act.[2] *Kircher*, 281 Mich App at 278, n 8. Therefore, whether there is a nuisance that may be abated without unconstitutionally taking property depends on whether the homes present a condition "the condition is harmful to the public health, safety, morals, or welfare," *Id.* at 278, which is a factual determination. *Id.* at 270. Neither party can plausibly argue that this question

[2] The unsafe structures ordinance, which is part of the section of the City code encompassing "Buildings and Building Regulations," under Chapter 18 references the state construction code act as the basis for the ordinances in that chapter.

as applied to the two buildings does not involve genuine issues of material fact, since this Court has heard widely varying testimony from the two sides during the show cause hearings addressing the condition of the homes, the costs of repairs to the homes and the necessity of those repairs. Therefore, summary disposition would not be appropriate in favor of either party on this claim if this claim still presented a live controversy. Nonetheless, because the Bonners' takings claim is premised on the January 29, 2009 demolition order that was issued under Section 18-59, and this Court has already ruled that Section 18-59 is constitutionally deficient, this issue is at present moot because the demolition may not proceed absent the issuance of a new demolition order. *General Motors Corp v Dep't of Treasury*, __ NW2d __ (Michigan Court of Appeals, issued October 28, 2010) (noting that an issue is moot "when a judgment, if entered, cannot have, for any reason, any practical legal effect on the existing controversy.").

e. Bonners' Procedural Due Process Claim Concerning Non-Conforming Use

The Bonners also raise a procedural due process claim, alleging that they did not receive due process of law prior to the deprivation of their non-conforming use of the homes. The Bonners state that the deprivation of the non-conforming use was "simply inserted" into a resolution by the City on July 16, 2009. The City responds that the Bonners were made aware of the City Council's intent to remove the non-conforming use status at a hearing on June 4, 2009 and were provided an opportunity to contest this issue at a June 18, 2009 hearing but did not raise the issues at the hearing nor did they timely appeal the Resolution.

Deciding whether a person has been deprived of procedural due process is a two-step analysis. "First, a court determines whether the plaintiff has a property interest entitled to due process protection; second, if the plaintiff has such a protected property interest, the court determines what process is due." *Sinclair v City of Ecorse*, 561 F Supp 2d 804, 808 (ED Mich 2008) (citing *Mitchell v Fankhauser*, 375 F3d 477, 480 (6th Cir 2004)). The property interest that

is alleged to have been unlawfully deprived in this case is the Bonners' nonconforming use of the homes as residential properties in an area that is now zoned commercial. Under *Heath v Sall*, 442 Mich 434 (1993), "[a] prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." Therefore, the plaintiff has a protected property interest. The only question remaining is what process is due, or phrased differently, whether the procedures attendant upon the deprivation of that property interest were constitutionally sufficient. *Dubuc v Green Oak Twp*, 642 F Supp 2d 694, 700, 703 (ED Mich, 2009).

The basic requirements of due process are well-established. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong v Manzo*, 380 US 545, 550 (1965). The City claims that these requirements were met when Jim Rowell informed the Bonners on June 4, 2009 that the City intended to deprive the Bonners of the non-conforming use status, and the Bonners had the remaining hearing on June 18, 2009 to contest this decision prior to the deprivation. However, the Bonners deny this claim and state in an affidavit that they never received notice of this loss of non-conforming use until it was adopted by the council in the July 16, 2009 resolution. Affidavit of Leon Bonner, ¶ 13. Further, the facts as to the nature of these hearings, when such notice was given, and what occurred before the City's determination that the non-conforming use was extinguished are unclear from the documents that have been provided by both parties in support of this motion.[3] Therefore, there are material factual issues that must be resolved by a trial as to this claim.

[3] The City does reference in the Findings of Fact document attached to their response brief, which was submitted to the Court following the evidentiary hearings conducted on the City's request for a preliminary examination,

f. Bonners' Procedural Due Process Claim Concerning Water

Finally, the Bonners raise an issue concerning the City's refusal to turn the water to the property back on after an order from the Court of Appeals to do so on August 6, 1979. The Bonners allege that the City's failure to turn the water back on has unconstitutionally deprived them of a protected property interest and is a violation of due process. The Bonners offer no argument concerning this alleged deprivation and cite no law in support of their claim.

The Bonners' federal claim concerning the City's alleged violation of due process by failing to turn the water back on after the Court of Appeal's 1979 order to do so is barred by the statute of limitations, as this Court has already determined in reference to their state law claim for contempt of court. Specifically, the Court held in the March 12, 2010 order that the claims for contempt of court and slander of title were time barred. The same operative facts exist for this federal constitutional claim. Therefore, under MCL 600.5805(10), an action for injury to property has a limitations period of 3 years. That limitations period ran on August 6, 1982. This action was not commenced until 27 years later. Accordingly, this claim is similarly time-barred.

IV. Conclusion

For the reasons cited above, the Court GRANTS IN PART and DENIES IN PART the Bonners' motion for summary disposition. The Court ORDERS as follows:

I. The Court finds that the City complied with the notice provisions of Section 18-52(c)(3) of the City Code. Further, the Court finds that neither the language in Section 18-60 nor Section 18-77, subsection 110.1 supersede the cost balancing analysis of Section 18-59 or permits an option to repair without reference to costs.

II. The Court determines that Section 18-59 violates the Due Process Clause of the 14th Amendment to the U.S. Constitution by depriving property owners of their interest in property without the option to repair and is therefore invalid. Consequently, the Court hereby enjoins any demolition of the homes at issue from proceeding under

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testimony from building official Jim Rowell in Volume II, Pages 276-277 of the transcripts that explains how the City arrived at the conclusion that the non-conforming use had been lost. This testimony, however, does not bear on when and in what manner the City gave notice to the Bonners and an opportunity to contest this determination.

the current order for demolition.

III. The Court finds that Section 18-59 does not improperly delegate legislative authority and provides sufficiently definite standard for review. Therefore, it is not unconstitutional in this respect, and the Bonners' claim concerning unconstitutional vagueness is dismissed.

IV. The Court finds that Section 18-59 is not facially unconstitutional under either the Takings Clause of the U.S. Constitution or Article 10, § 2 of the Michigan Constitution, and the Bonners' facial challenge to the ordinance is dismissed. Further, the Court finds that the City is immune from a claim that property has been improperly taken without just compensation if it is proven that the property is a nuisance. However, this issue is moot due to the Court's invalidation of the ordinance and the existing demolition order.

V. The Court finds that the deprivation of the Bonners' non-conforming use status is a protected property interest for which the Bonners must receive notice and an opportunity to be heard prior to such deprivation. However, there are genuine material factual disputes concerning this claim.

VI. Finally, the Bonners' claim for a violation of Due Process based on the City's refusal to turn the water back on is time-barred under MCL 600.5805(10).

IT IS SO ORDERED.

Hon. Michael P. Hatty
Circuit Court Judge

EXHIBIT D

298 Mich.App. 693
Court of Appeals of Michigan.

BONNER
v.
CITY OF BRIGHTON.

Docket No. 302677. | Submitted April 3, 2012, at Detroit. | Decided Dec. 4, 2012, at 9:10 a.m.

Synopsis

Background: Landowners brought action against city, alleging city's order, pursuant to local ordinance, for landowners to demolish certain residential structures was unconstitutional, and city sought injunctive relief for enforcement of ordinance. The Livingston Circuit Court, Michael P. Hatty, J., granted partial summary disposition to landowners.

[Holding:] On city's appeal by leave granted, the Court of Appeals, Markey, P.J., held that ordinance facially violated due process.

Affirmed.

Murray, J., dissented and filed opinion.

West Headnotes (20)

[1] **Municipal Corporations**
⇦ Construction and operation

When reviewing an ordinance, court applies the same rules applicable to the construction of statutes.

1 Cases that cite this headnote

[2] **Constitutional Law**
⇦ Notice and Hearing
Constitutional Law
⇦ Impartiality

Procedure in a particular case is constitutionally sufficient under the due process clause when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker. U.S.C.A. Const.Amend. 14.

[3] **Constitutional Law**
⇦ Rights and interests protected; fundamental rights

Although the text of the due process clause provides only procedural protections, due process also has a substantive component that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[4] **Constitutional Law**
⇦ Police power, relationship to due process

The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[5] **Constitutional Law**
⇦ Egregiousness; "shock the conscience" test

In the context of government actions, a substantive due process violation is established only when the governmental conduct is so arbitrary and capricious as to shock the conscience. U.S.C.A. Const.Amend. 14.

[6] **Constitutional Law**
⇦ Police power, relationship to due process

A citizen is entitled to due process of law when a municipality, exercising its police power, enacts an ordinance that affects the citizen's constitutional rights. U.S.C.A. Const.Amend. 14.

[7] **Constitutional Law**
⇦ Police power, relationship to due process

Constitutional Law
⇦ Property in General

In determining whether an ordinance enacted by a municipality comports with due process, the test employed is whether the ordinance bears a reasonable relationship to a permissible legislative objective; when a municipal ordinance restricts the use of property, the issue is whether the exercise of authority entails an undue invasion of private constitutional rights without a reasonable justification in connection with the public welfare. U.S.C.A. Const.Amend. 14.

[8] **Constitutional Law**
⇦ Due process

Constitutional Law
⇦ Due process

In a challenge to the constitutionality of an ordinance, court begins with the presumption that the ordinance is reasonable and thus constitutionally compliant under the due process clause, and the burden is upon the person challenging an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance. U.S.C.A. Const.Amend. 14.

[9] **Constitutional Law**
⇦ Police power, relationship to due process

An ordinance does not offend the due process clause when it satisfies the reasonableness test; the ordinance must be reasonable or reasonably necessary for purposes of preserving the public health, morals, or safety. U.S.C.A. Const.Amend. 14.

[10] **Constitutional Law**
⇦ Police power, relationship to due process

An ordinance will be declared unconstitutional under the due process clause only if it constitutes an arbitrary fiat or a whimsical ipse dixit, leaving no legitimate dispute regarding its unreasonableness. U.S.C.A. Const.Amend. 14.

[11] **Constitutional Law**
⇦ Procedural due process in general

In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. U.S.C.A. Const.Amend. 14.

[12] **Constitutional Law**
⇦ Procedural due process in general

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. U.S.C.A. Const.Amend. 14.

[13] **Constitutional Law**
⇦ Procedural due process in general

Procedural due process differs from substantive due process in that procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable property interests. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[14] **Constitutional Law**
⇦ Procedural due process in general

A procedural due process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards. U.S.C.A. Const.Amend. 14.

[15] **Constitutional Law**
⇦ Destruction of property

Municipal Corporations
⇦ Destruction of or injury to property

Ordinance providing for demolition of unsafe structure on a property owner's land, which ordinance effectively precluded unreasonable repair and provided that repair was unreasonable if repair costs would exceed structure's true cash value, facially violated due process, even though ordinance could be interpreted to allow a property owner the opportunity to overcome or rebut presumption of unreasonableness of repair; ordinance precluded an owner from avoiding a demolition order by repairing a structure and bringing it up to code if the cost of repairs exceeded the city-determined true cash value of the structure before it became unsafe, and there were a myriad of reasons why an owner might want to repair a structure even if not economically profitable to do so. U.S.C.A. Const.Amend. 14.

[16] **Constitutional Law**
⇦ Destruction of property

Municipal Corporations
⇦ Destruction of or injury to property

Ordinance providing for demolition of unsafe structure on a property owner's land, which ordinance effectively precluded unreasonable repair and provided that repair was unreasonable if repair costs would exceed structure's true cash value, did not bear reasonable relationship to permissible legislative objective of protecting citizens from unsafe and dangerous structures, violating substantive due process; there was no sound reason for prohibiting a willing property owner from undertaking corrective repairs on basis that making such repairs was an unreasonable endeavor, given that the repairs would equally result in achieving legislative objective. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law**
⇦ Destruction of property

Municipal Corporations
⇦ Destruction of or injury to property

Ordinance providing for demolition of unsafe structure on a property owner's land did not provide adequate procedural safeguards to satisfy due process clause, even though ordinance provided for notice and hearing; ordinance did not provide for reasonable opportunity to repair an unsafe structure to avoid demolition, and added safeguard of a repair option would have minimally affected city's interest in health and welfare of citizens while eliminating the risk of an erroneous deprivation of the property interest. U.S.C.A. Const.Amend. 14.

[18] **Constitutional Law**
⇦ Fairness in general

Constitutional Law
⇦ Factors considered; flexibility and balancing

Due process is a flexible concept, but its essence is fundamental fairness. U.S.C.A. Const.Amend. 14.

[19] **Constitutional Law**
⇦ Factors considered; flexibility and balancing

The due process procedures that are constitutionally required in a particular case are determined by examining: (1) the private interest at stake or affected by the governmental action; (2) the risk of an erroneous deprivation of the interest under existing procedures and the value of additional safeguards; and (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens. U.S.C.A. Const.Amend. 14.

[20] **Constitutional Law**
⇦ Notice and Hearing

Constitutional Law
⇦ Impartiality

Procedural due process is not always satisfied in full simply because notice, a hearing, and an impartial decisionmaker were provided. U.S.C.A. Const.Amend. 14.

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Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

Opinion

MARKEY, P.J.

*696 Defendant-counterplaintiff, city of Brighton (the city), appeals by leave granted the trial court's order granting partial summary disposition in favor of plaintiffs. The trial court determined that § 18–59 of the Brighton Code of Ordinances (BCO) violates substantive due process when it permits the city to have an unsafe structure demolished as a public nuisance, without providing the owner the option to repair it, if the structure is deemed unreasonable to repair, which is presumed when repair costs would exceed 100 percent of the structure's true cash value as reflected in the assessment tax rolls before the structure became unsafe. We interpret the ordinance as only allowing the exercise of an option to repair when a property owner overcomes or rebuts *697 the presumption of unreasonableness by proving that it is economical to do so, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. We additionally find that while police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe and free from harm, the ordinance's exclusion of a repair option when city officials deem the repairs unreasonable **411 on the basis of expenses that the owner is able and willing to incur bears no reasonable relationship to the legislative objective. This is true because demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even unreasonable ones. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing a procedure to safeguard an owner's right to retain property by performing what others might consider unreasonably expensive repairs, which would burden the city to a lesser extent than demolition, the city's ordinance violates procedural due process. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs own two residential properties located in downtown Brighton. There is a house on one parcel of property and a house with a garage or barn on the other. According to the city, the three structures have been unoccupied and largely ignored and unmaintained for over 30 years, representing the most egregious instances of residential blight in Brighton. The city's building and code enforcement official (hereafter "building official") informed plaintiffs in a letter that *698 the structures on the two properties constituted unsafe structures under the BCO [1] and public nuisances under Michigan common law. The building official cited a litany of alleged defects and code violations in regard to the condition of the structures. Plaintiffs were further informed that it had been determined that it was unreasonable to repair the structures as defined in BCO § 18–59, which provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.
>
> Plaintiffs were ordered to demolish the structures with no option to repair within 60 days.

Plaintiffs appealed the determination to the city council pursuant to BCO § 18–61, which provides in pertinent part:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal.... The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. *699 The city council may affirm, modify, or

> reverse all or part of the determination of the city manager, or his designee.

In preparation for the appeal, plaintiffs retained a structural engineer and various contractors to determine the repairs necessary to bring each structure into compliance with the applicable building codes. Plaintiffs subsequently filed affidavits signed by their retained engineer and contractors that addressed the condition of **412 the structures relative to their professional field and provided cost estimates with respect to the proposed repairs. These individuals prepared drawings and repair plans and asserted that the structures were safe, structurally sound, and readily repairable. At a hearing before the city council, plaintiffs agreed to provide the building official with an expert's report and to allow city personnel access to the structures for purposes of exterior and interior inspections. The city council tabled the appeal pending the inspections. Subsequently, plaintiffs authorized their contractors to commence some repairs, and applications for building permits were submitted to the city. In a letter to plaintiffs, the building official denied the building-permit applications and accused plaintiffs of refusing to allow inspections of the structures and of failing to provide their expert's report, contrary to plaintiffs' agreement at the city council hearing. The building official also noted that the city had the right to inspect property before granting permits. Because they were denied building permits, plaintiffs did not complete any repairs.[2] Plaintiffs' alleged lack of cooperation and failure to abide by their agreements resulted in the building official obtaining administrative search warrants for *700 the properties. The search warrants authorized a search, inspection, and examination of the interior and exterior of each structure to determine whether they were in compliance with applicable laws, codes, and ordinances. After inspecting the structures pursuant to the administrative search warrants, the city's inspectors and experts identified extensive defects and code violations, requiring numerous repairs and the replacement of certain structural features. When litigation commenced, the city filed affidavits by these individuals. In communications to plaintiffs and the city council, the building official reiterated his position that the structures were unsafe, BCO § 18–46, that it would be unreasonable to repair them, BCO § 18–59, and that therefore, demolition was required.

The pending appeal to the city council was resumed, and hearings were conducted in which the council received the reports of inspectors, contractors, engineers, and other experts, along with written repair estimates, PowerPoint presentations, testimony, and oral arguments. The building official and his experts opined that the total cost to bring the structures up to code was approximately $158,000. The city determined the cash value of the structures at approximately $85,000. One of plaintiffs' experts opined that it would cost less than $40,000 per house to make the necessary repairs and bring the structures up to code.

In Resolution 09–16, Decision on Appeal, the city council adopted the findings set forth in the building official's inspection reports, accepted his repair estimates and agreed with the oral testimony and PowerPoint presentations the building official introduced. The city council determined that plaintiffs' reports and *701 cost estimates lacked credibility and that the structures had lost their status as nonconforming, single-family residential uses. The council concluded that the structures constituted "unsafe structures" under BCO § 18–46, that plaintiffs were in violation of BCO § 18–47 by owning and maintaining unsafe structures, and that the structures were unreasonable to repair and must be demolished under BCO § 18–59. The city council **413 ordered plaintiffs to demolish the structures within 60 days.

Plaintiffs did not take any steps toward demolishing the structures within the 60–day period. Shortly before the 60–day period was set to expire, plaintiffs filed the instant action against the city, alleging, in a first amended complaint, a violation of procedural and substantive due process, a violation of equal protection, inverse condemnation or a regulatory taking, contempt of court, common-law and statutory slander of title, and a violation of Michigan housing laws under MCL 125.540.[3] Plaintiffs' constitutional challenges were predicated on the United States Constitution, 42 U.S.C. § 1983, and the Michigan Constitution. After the complaint was filed, the city's building official, under the authority of BCO § 18–58, issued plaintiffs an order to show cause to appear before the city council where they would have the opportunity to present testimony and evidence as to why the structures should not be demolished. The order to show cause set forth an exhaustive list of defects and problems associated with the structures that rendered them "unsafe." The city council conducted a show-cause hearing in which plaintiffs participated. The council rejected plaintiffs' position *702 against demolition.[4] Again, the show-cause proceedings occurred after the lawsuit was commenced.

The city subsequently filed its own complaint in a separate action, requesting injunctive relief in the form of an order enforcing BCO § 18–59 and requiring demolition

of the structures. The trial court consolidated the cases. Plaintiffs filed a motion for partial summary disposition with respect to their complaint, arguing that BCO § 18–59 was unconstitutional. The trial court denied the motion on procedural grounds, concluding that plaintiffs were required, but failed to submit, documentary evidence.[5] The trial court also denied the city's request for a preliminary injunction to demolish the structures, which the court found to be an improper *703 request given the entirety of the proceedings pending before the court. Throughout **414 the litigation, plaintiffs filed numerous motions seeking court authorization to make various repairs and to abate the alleged public nuisances. The motions were denied, although the court did permit plaintiffs to place a tarp on a roof and to close open and obvious access points. Eventually, plaintiffs renewed their motion for partial summary disposition, again arguing that BCO § 18–59 was unconstitutional on a variety of grounds, including a claim that the ordinance violated substantive due process. The trial court rejected plaintiffs' argument that BCO § 18–59 was unconstitutional because it constituted an improper delegation of legislative authority, and the court found that issues of fact existed on the constitutional argument that application of BCO § 18–59 resulted in a taking without just compensation. The trial court also ruled, however, that BCO § 18–59, on its face, violated substantive due process.[6]

The trial court determined that BCO § 18–59 violated substantive due process because it precluded property owners from having the opportunity to repair their property, which served no rational interest or purpose, was entirely arbitrary, and shocked the conscience. The trial court agreed with the city that the demolition of unsafe structures promoted the legitimate interest of public health and safety; however, that interest, the court stated, was not advanced by denying a property owner the chance to repair an unsafe structure. The court observed that if the owner repaired a structure and brought it up to code, the health and safety of the *704 public would be advanced. The trial court reasoned that the interest in the public's health and safety is equally advanced by demolition and by owner repairs that satisfy city standards. The court determined that giving a landowner an opportunity to repair his or her property would not inhibit a municipality's ability to protect the public health and safety. The trial court also indicated that Michigan law required giving a property owner a chance to repair prior to a demolition conducted for safety reasons. The court noted that there was an abundance of persuasive authority from other jurisdictions that found similar ordinances withholding the option to repair advanced no rational purpose and were arbitrary. The trial court concluded that the city "must cure this defect in the ordinance and must reissue a new demolition order under the revised ordinance before proceeding with any demolition of the properties." The court denied the city's motion for reconsideration. This Court granted the city's application for leave to appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition. *Kuznar v. Raksha Corp.*, 481 Mich. 169, 175, 750 N.W.2d 121 (2008). We also review de novo constitutional issues as well as questions concerning the proper construction of an ordinance. *Kyser v. Kasson Twp.*, 486 Mich. 514, 519, 786 N.W.2d 543 (2010).

[1] When reviewing an ordinance, we apply the same rules applicable to the construction of statutes. *Great Lakes Society v. Georgetown Charter Twp.*, 281 Mich.App. 396, 407, 761 N.W.2d 371 (2008). "The goal of statutory construction, and thus of construction and interpretation *705 of an ordinance, is to discern and give effect **415 to the intent of the legislative body." *Id.* at 407–408, 761 N.W.2d 371. The words used by the legislative body provide the most reliable evidence of its intent. *Shinholster v. Annapolis Hosp.*, 471 Mich. 540, 549, 685 N.W.2d 275 (2004). Unless otherwise defined, we assign the words in a municipal ordinance their plain and ordinary meanings, *Great Lakes Society*, 281 Mich.App. at 408, 761 N.W.2d 371, avoiding an interpretation that would render any part of an ordinance surplusage or nugatory, *Zwiers v. Growney*, 286 Mich.App. 38, 44, 778 N.W.2d 81 (2009). Also, unless a different intent is manifest, the language used by the legislative body must be understood and read in its grammatical context. *Shinholster*, 471 Mich. at 549, 685 N.W.2d 275. The legislative body is deemed to have intended the meaning clearly expressed in an ordinance's unambiguous language, which must be enforced as written. *Id.* " 'A necessary corollary of these principles is that a court may read nothing into an unambiguous [ordinance] that is not within the manifest intent of the [legislative body] as derived from the words of the [ordinance] itself.' " *Zwiers*, 286 Mich.App. at 44, 778 N.W.2d 81 (citation omitted).

B. CONSTITUTIONAL DUE PROCESS PRINCIPLES

[2] [3] [4] [5] The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const, Am XIV; Const 1963, art 1, § 17; *Reed v. Reed,* 265 Mich.App. 131, 159, 693 N.W.2d 825 (2005). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id.* And, although the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty ***706** and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. *Gen. Motors Corp. v. Dep't of Treasury,* 290 Mich.App. 355, 370, 803 N.W.2d 698 (2010); *Mettler Walloon, L.L.C. v. Melrose Twp.,* 281 Mich.App. 184, 197, 761 N.W.2d 293 (2008). The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. [7] *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 541, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). In the context of government actions, a substantive due process violation is established only when "the governmental conduct [is] so arbitrary and capricious as to shock the conscience." *Mettler Walloon,* 281 Mich.App. at 198, 761 N.W.2d 293; see also *In re Beck,* 287 Mich.App. 400, 402, 788 N.W.2d 697 (2010), aff'd 488 Mich. 6, 793 N.W.2d 562 (2010).

In *Kropf v. Sterling Hts.,* 391 Mich. 139, 157, 215 N.W.2d 179 (1974), our Supreme Court discussed a substantive due process claim in the context of a zoning ordinance, stating:

> A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence. The power of the city to enact ordinances is not absolute. It has been given power by the State of Michigan to ****416** zone and regulate land use within its boundaries so that the inherent police powers of the state may be more effectively implemented on the local level. But the state cannot confer upon the local unit of government that which it does not ***707** have. For the state itself to legislate in a manner that affects the individual right of its citizens, the state must show that it has a sufficient interest in protecting or implementing the common good, via its police powers, that such private interests must give way to this higher interest.

[6] [7] [8] [9] [10] A citizen is entitled to due process of law when a municipality, exercising its police power, enacts an ordinance that affects the citizen's constitutional rights. *Kyser,* 486 Mich. at 521, 786 N.W.2d 543. In determining whether an ordinance enacted by a municipality comports with due process, the test employed is whether the ordinance bears a reasonable relationship to a permissible legislative objective. *Id.* When a municipal ordinance restricts the use of property, the issue is whether the exercise of authority entails an undue invasion of private constitutional rights without a reasonable justification in connection with the public welfare. *Id.* We begin with the presumption that an ordinance is reasonable and thus constitutionally compliant. *Id.* "[T]he burden is upon the person challenging ... an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance." *Id.* The property owner must demonstrate that the challenged ordinance arbitrarily and unreasonably affects the owner's use of his or her property. *Id.* An ordinance does not offend the Due Process Clause when it satisfies the reasonableness test; the ordinance must be reasonable or reasonably necessary for purposes of preserving the public health, morals, or safety. [8] *Id.* at 523, 529, 786 N.W.2d 543. An ordinance will be declared unconstitutional ***708** only if it constitutes an arbitrary fiat or a whimsical ipse dixit, leaving no legitimate dispute regarding its unreasonableness. *Id.* at 521–522, 786 N.W.2d 543.

Although the trial court's ruling and the arguments of the parties are framed in the context of substantive due process, we find that the nature of the issues presented in this case also implicate procedural due process. The principle espoused by plaintiffs is that a property owner has the right, or must have the option or opportunity, to make repairs to a structure deemed unsafe by a municipality before the structure can be demolished or razed. Plaintiffs do not contend that the city lacks the general authority to demolish unsafe or dangerous

structures; they instead argue that a property owner must be afforded the opportunity to repair an unsafe structure before the city orders it demolished. Plaintiffs' argument contains elements of procedural due process requiring notice, hearing, and a ruling by an impartial decision-maker, before the government infringes constitutionally protected property interests.

[11] [12] [13] [14] "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." **417 *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). " 'Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.' " *Id.* at 125–126, 110 S.Ct. 975 (citation omitted). Procedural due process differs from substantive due process in that "procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable [property] interests." *Bartell v. Lohiser,* 215 F.3d 550, 557 (C.A.6, 2000). A procedural due *709 process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards. *Schiller v. Strangis,* 540 F.Supp. 605, 613 (D.Mass., 1982). To establish a violation of procedural due process, one must show that the action concerned a recognizable property or liberty interest, that there was a deprivation of that interest absent due process of law, and that the deprivation took place under the color of state law. *Id.* "A 'substantive due process' claim is, fundamentally, not a claim of procedural deficiency, but, rather, a claim that the state's conduct is inherently impermissible." *Id.* at 614. [9]

In *D & M Fin. Corp. v. City of Long Beach,* 136 Cal.App.4th 165, 174, 38 Cal.Rptr.3d 562 (2006), the California Court of Appeal stated that "[w]hen a city threatens to demolish structures, due process requires that the city provide the property owner and other interested parties with notice, with the opportunity to be heard, and with the opportunity to correct or repair the defect before demolition." And, in *Hawthorne S. & L. Ass'n v. City of Signal Hill,* 19 Cal.App.4th 148, 159, 23 Cal.Rptr.2d 272 (1993), quoting *Miles v. Dist. of Columbia,* 166 U.S.App.D.C. 235, 239, 510 F.2d 188, 192 (1975), the court opined:

> "A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health. However, that municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to *710 make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law."

Plaintiffs' position in this case that the ordinance denies them the right or an opportunity to repair prior to demolition can be equated to an argument that the ordinance lacks a necessary procedural safeguard or that it is procedurally deficient or inadequate. Plaintiffs do not contend that demolition of an unsafe structure is unlawful even when an option to repair is extended to the property owner by the municipality. Rather, plaintiffs' position is that a deprivation of a property interest by way of demolition is unjustified *if* an opportunity to correct any structural defects is not made available. Plaintiffs do not take the stance that demolition of unsafe structures is inherently impermissible. To some extent, the mere manner in which the issue is framed bears on whether plaintiffs' claim is one of substantive or procedural due process. Plaintiffs certainly contend that the demolition of unsafe structures "without a sound repair option" is inherently impermissible. As the court in *Schiller,* 540 F.Supp. at 614, noted, "[T]he line dividing 'procedural due process' **418 from 'substantive due process' is not always bright, [and] it may be difficult in some cases to determine which is the proper characterization of the plaintiff's claim." Ultimately, we conclude that the ordinance infringes on plaintiffs' due process rights, whether denominated procedural or substantive, thereby making it unnecessary to determine which due process principle is actually embodied in plaintiffs' argument.

C. DISCUSSION

[15] We first carefully examine the language of BCO § 18–59 to determine and define its scope, its requirements, *711 and its proper implementation. Again, BCO § 18–59, which

is titled "Unreasonable repairs," provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair. [[10]]

Accordingly, there must be an initial determination that a structure is indeed unsafe, and the definition of an "unsafe structure" is found in BCO § 18–46. The city's building official determined that the structures were unsafe under BCO § 18–46, and plaintiffs do not debate that conclusion for purposes of this appeal. Next, there must be a determination, which the building official in this case made as to all buildings, that the repair costs would exceed the true cash value of a structure as reflected in past assessment tax rolls when the structure was not characterized as unsafe. Once a determination is made that an unsafe structure exists and that the cost to repair exceeds the structure's value ***712** before it became unsafe, it is *presumed* that the repairs are unreasonable and that the structure is a public nuisance subject to demolition without the option to repair. Therefore, the ordinance does not definitively establish the unreasonableness of repairs, the existence of a public nuisance, and the authority to order demolition without option to abate the nuisance and repair the structure. Rather, the ordinance merely gives rise to these presumptions. [11]

"Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." Black's Law Dictionary (8th ed). For purposes of our analysis, we shall assume that the "presumed" language in BCO § 18–59 does not create a ****419** conclusive, mandatory, absolute, or irrebuttable presumption, which would only strengthen our conclusion that the ordinance violates due process. Under BCO § 18–59, a property owner may, regardless of the fact that repair costs would exceed a structure's true cash value, avail himself or herself of an opportunity to overcome or rebut the presumption by showing that making repairs would nonetheless be reasonable under the circumstances. In turn, accomplishing the repairs would abate any unsafe conditions negating the presumption of public nuisance, thereby precluding a demolition order. Conceivably, a property owner could attempt to rebut the presumptions of BCO § 18–59 by pleading the owner's case directly to the city manager ***713** or his designee, here the building official, but an attempt to show the reasonableness of repairs could presumably also be pursued in an appeal to the city council under BCO § 18–61. The city council contemplated, but ultimately rejected, a resolution which would have allowed plaintiffs six months to make the repairs necessary to avoid a demolition order.

Even though BCO § 18–59 can be interpreted to allow a property owner the opportunity to overcome or rebut the presumptions of that section, creating the possibility that an owner of a structure determined to be unsafe will be accorded an option to repair, such a construction of BCO § 18–59 still requires an owner to establish the reasonableness of making repairs. Stated otherwise, in order to overcome the presumption that allows the city to order demolition absent an option to repair, the property owner must show that making repairs is reasonable. We find this aspect of the ordinance to be constitutionally problematic and in violation of due process. The appeal section, BCO § 18–61, does not provide its own or a different standard; therefore, the city council in addressing an appeal would be constrained to also apply the reasonableness standard that governs BCO § 18–59. Such a standard prevents a property owner who has the desire and ability to make the necessary repairs in a timely fashion to render a structure safe, even when the cost of repairs exceeds the city-determined true cash value of the structure before it became unsafe, from doing so because the ordinance deems such repairs unreasonable.

We conclude that if the owner of an unsafe structure wishes to incur an expense that others might find unreasonable to repair a structure, bring it up to code, and avoid a demolition order, the city should not infringe upon the owner's property interest by forbidding ***714** it. There may be myriad reasons why a property owner would desire to repair a structure under circumstances in which it is not economically profitable to do so, including sentimental, nostalgic, familial, or historic,

which may not be measurable on an economic balance sheet. Ultimately, the owner's reasons for desiring to repair a structure to render it safe when willing and able even though costly, are entirely irrelevant and of no concern to the municipality.

We note that BCO § 18–59, by using the language "*may* be ordered" (emphasis added), gives the city manager or his designee the discretion to not order the demolition of a structure and to allow repairs even though the structure is unsafe and the repair costs exceed the structure's pertinent value. In other words, demolition is not mandated when it is unreasonable to make repairs. We find, however, that this discretionary language does not save the ordinance from constitutional challenge, considering that the ordinance places no constraints on the exercise of what is essentially unfettered decretion.

**420 [16] We hold that BCO § 18–59 violates substantive due process because it is arbitrary and unreasonable, constituting a whimsical ipse dixit; it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable. When a property owner is willing and able to timely repair a structure to make it safe, preventing that action on the basis of the ordinance's standard of reasonableness does not advance the city's interest of protecting the health and welfare of its citizens. We do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that *715 objective can entail demolishing or razing unsafe structures. [12] But BCO § 18–59 does not bear a reasonable relationship to this permissible legislative objective. [13] *Kyser,* 486 Mich. at 521, 786 N.W.2d 543. There are two ways to achieve the legislative objective, demolition or repair, either of which results in the abatement of the nuisance or danger of an unsafe structure. There is simply no sound reason for prohibiting a willing property owner from undertaking corrective repairs on the basis that making such repairs is an unreasonable endeavor, given that the repairs, similar to demolition, will equally result in achieving the objective of protecting citizens from unsafe structures. [14] If a property owner fails to make the *716 necessary repairs within a reasonable timeframe, demolition can then be ordered. The city's restriction on plaintiffs' opportunity to repair the structures and right to protect their constitutionally recognized property interests from invasion has no reasonable relation to the public welfare. *Kyser,* 486 Mich. at 521, 786 N.W.2d 543. The public welfare is safeguarded by the construction repairs, and the ordinance does not afford the public greater protection or safeguards by calling for demolition over repairs when making repairs is characterized as being unreasonable. Of course, the municipality has the authority to define the repairs necessary and to set a reasonable time limit for their completion. For the reasons set forth above, we conclude that BCO § 18–59 violates substantive due process. **421

[17] We also determine that BCO § 18–59 does not provide adequate procedural safeguards to satisfy the Due Process Clause. Before potentially depriving plaintiffs or any city property owners of their constitutionally protected property interests through demolition predicated on a determination that a structure is unsafe, the city was constitutionally required to provide plaintiffs with a reasonable opportunity to repair the unsafe structure, regardless of whether doing so might be viewed as unreasonable because of its cost. In addition to notice, a hearing, and an impartial decision-maker, which are provided for in § 18 of the BCO, the city should have also provided for a reasonable opportunity to repair an unsafe structure, limited only by unique or emergency situations. [15] Precluding an opportunity to repair on the basis that it is too costly in comparison *717 with a structure's value or that making repairs is otherwise unreasonable can result in an erroneous and unconstitutional deprivation of a property interest, i.e., a deprivation absent due process of law. Giving a property owner the procedural protection of a repair option is the only way the city's ordinances could withstand a procedural due process challenge.

[18] [19] Due process is a flexible concept, but its essence is fundamental fairness. *Reed,* 265 Mich.App. at 159, 693 N.W.2d 825. The procedures that are constitutionally required in a particular case are determined by examining (1) the private interest at stake or affected by the governmental action, (2) the risk of an erroneous deprivation of the interest under existing procedures and the value of additional safeguards, and (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens. *In re Brock,* 442 Mich. 101, 111, 499 N.W.2d 752 (1993), citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The nature of the private interest at stake in this case is substantial—plaintiffs' property interest as owners of three structures. Next, the risk of an erroneous deprivation of the property interest under BCO § 18–59 is significant as it allows for the demolition of unsafe structures when repairs are considered unreasonable despite an owner's willingness and

ability to make timely repairs. The added safeguard of a repair option would eliminate the risk of an erroneous deprivation of the property interest. Finally, adding the safeguard of a repair option would minimally affect the city's interest in the health and welfare of its citizens, as well as not cause any fiscal or administrative burdens beyond those that would be associated with demolition of the property. Under BCO § 18–59, the cost to the city if it demolishes an unsafe structure may be assessed as a lien against the real property. If repairs are undertaken *718 by a property owner pursuant to a repair option, the owner and not the city bears the cost of those repairs, and the city's only function would be to determine what repairs are necessary and monitor their timely completion. With forced demolition by the city, the city would incur the costs and then have to seek reimbursement of expenses incurred, possibly requiring lien-foreclosure proceedings. In sum, on review of the pertinent factors in the present case, we find that procedural due process requires a property owner to have an option **422 to repair a structure determined to be unsafe except in unique and emergency situations demanding immediate action.

Court decisions in other jurisdictions, while not binding precedent, provide persuasive support for our holding. See *Ammex, Inc. v. Dep't of Treasury,* 273 Mich.App. 623, 639 n. 15, 732 N.W.2d 116 (2007). In *Washington v. City of Winchester,* 861 S.W.2d 125 (Ky.App., 1993), the appellant-owner challenged a circuit court order that required her to demolish a building that had numerous building code violations. A building inspector initially ordered demolition, which decision was appealed to a city appeals board. The appeals board delayed demolition to allow a determination regarding the value of the building and the cost of repairs necessary to bring the building into compliance with the building code. Subsequently it was determined that the estimated cost to repair the building exceeded 100 percent of the building's appraised value. On the basis of this information, the appeals board affirmed the inspector's demolition order, and the circuit court then affirmed the decision by the appeals board. On appeal to the Kentucky Court of Appeals, the appellant building owner argued that she should have been given the opportunity to bring the building into compliance with the code through repairs. *Id.* at 126. Two separate code provisions were relevant, and they provided:

> *719 PM–111.1: The code official shall order the owner of any premises upon which is located any structure or part thereof, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation, occupancy or use, and so that such structure would be unreasonable to repair the same, to raze and remove such structure or part thereof; or if such structure can be made safe by repairs, to repair and make safe and sanitary or to raze and remove at the owner's option[.]
>
> PM–111.2: Whenever the code official determines that the cost of such repairs would exceed 100% of the current value of such structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this section that such structure is a public nuisance which shall be ordered razed without option on the part of the owner to repair. [*Id.*]

The appellate court agreed with the building owner that she should have been given the option to repair the building within a reasonable time. *Id.* The court, citing *Johnson v. City of Paducah,* 512 S.W.2d 514, 516 (Ky.1974), held that "the exercise of the city's police power is for the protection of the public, but the means of its implementation may extend no further than public necessity requires." *Washington,* 861 S.W.2d at 126. The court noted that the failure to provide a property owner the option of repair was arbitrary, that the government did not have absolute power over private property, and that improperly requiring demolition absent compensation constituted a taking. *Id.* at 126–127. [16] Finally, the Kentucky court observed:

> **423 *720 [J]ust as the cost of ... [code] compliance is a property owner's problem; the method of compliance is also the property owner's decision. It's his/her money and far be it from the [c]ity to say how a reasonable person should spend his/her money.... [A]s free men and women, we can spend our own money as we see fit, that if we want to pour endless dollars, sweat, etc., into some historic building, or personally appealing project, we may—even if the ultimate cost would be ten fold over the cost of demolition and rebuilding. So, too, with the [c]ity ... and the appellant herein, if she wants to pour huge sums of money into her unfit building[ ], she has that option. A reasonable person may very well choose demolition, but it's her money and her choice. [*Id.* at 127.]

We agree with these sentiments and observations. While BCO § 18–59 varies slightly from the code provision at issue in *Washington,* we adopt the principles espoused in *Washington* for purposes of our analysis of BCO § 18–59.

In *Herrit v. City of Butler Code Mgt. Appeal Bd.*, 704 A.2d 186 (Pa.Commw.1997), the Pennsylvania Commonwealth Court addressed the constitutionality of a code provision identical to that at issue in *Washington*. The appellant, whose property was found to be unsafe and a public nuisance, maintained that the code provision was unconstitutional because it did not give him the opportunity to repair his property before demolition. *Id.* at 188. The court initially pointed out that the purpose of the demolition notice was to provide a property owner a reasonable amount of time to make repairs to abate the dangerous condition. *Id.* at 189. The court, relying on *Washington*, 861 S.W.2d at 125, concluded that the code provision was unconstitutional. It reasoned that the provision was not reasonably ***721** related to the health, safety, or general welfare of the public, because there was no rational basis not to permit the appellant the option to abate the nuisance. *Id.* The Pennsylvania court concluded that if the appellant wanted "to spend unreasonable amounts of money to bring his [p]roperty into compliance, that [was] only his concern." *Id.*

As in *Herrit* and *Washington*, we conclude that whether it is economically reasonable for a property owner to repair an unsafe or dangerous structure is irrelevant and cannot serve as the basis to deny a property owner an opportunity to repair a structure in order to comply with applicable code provisions.[17]

In considering an ordinance that permitted the demolition of a structure when the cost to comply with code requirements exceeded 50 percent of the structure's present value, the Georgia Court of Appeals ruled in *Horne v. City of Cordele*, 140 Ga.App. 127, 130–131, 230 S.E.2d 333, 335–336 (1976):

> The vice of the ordinance under consideration is that it flatly permits uncompensated destruction of the owner's property where the cost of repair would exceed 50 percent of the value of the structure unrepaired....
>
> * * *
>
> In the present case it appears that the owner twice applied for and was refused building permits in order to repair the house under consideration here. We do not find it necessary to reach the question ****424** of whether the owner was in good or bad faith in applying, or whether the ***722** building inspector was in good or bad faith in refusing the applications, or to pass on the remaining enumerations of error. Our holding is that any ordinance which authorizes demolition of a structure within the city without compensation to the owner merely because the cost of repair exceeds the value of the structure or any percentage thereof, without first allowing opportunity to repair (and, if necessary, providing for discovery of the criteria which must be met to bring the structure up to a minimum standard) is unconstitutional and void.

In *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled in part on other grounds by *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982), the North Carolina Supreme Court held that under its state constitutional version of the Due Process Clause, a city could not rely on an ordinance to order the demolition of unsafe structures without opportunity of repair when the cost to do so would exceed 60 percent or more of an unrepaired structure's value. The court, in finding a constitutional violation, noted that the city did not assert that the structure could not be made code compliant if it were to be repaired or find the existence of an imminent threat to the safety of persons or property that required the immediate destruction of the structure. *Id.* at 360, 177 S.E.2d 885. The court reasoned that the state's " 'police power does not include power arbitrarily to invade property rights.' " *Id.* at 363, 177 S.E.2d 885 (citation omitted). Further, "[p]olice regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest.' " *Id.* (citation omitted). Thus, the court concluded that when a structure can be repaired, it would be arbitrary and unreasonable for the city to require its destruction without first giving the owner a reasonable opportunity to remove the threat to the public health, safety and welfare by completing the necessary repairs. *Id.*

***723** The case of *Village of Lake Villa v. Stokovich*, 211 Ill.2d 106, 284 Ill.Dec. 360, 810 N.E.2d 13 (2004), in which the court found constitutional a statute permitting a municipality to file a complaint in court to seek the demolition of a dangerous and unsafe building after giving notice of the need to put the building in a safe condition, is a bit more difficult to assess. The property owners in that case agreed that the provision was intended to serve a legitimate governmental interest, but they argued that the cost limitation on the right to repair in the statute was arbitrary, unreasonable, and not rationally related to the governmental interest, citing many of the cases we have noted. The Illinois Supreme Court concluded that the cases cited by the property owners were inconsequential "because, in each case, the state statute or local ordinance found unconstitutional allowed an officer of the municipality to issue an order of demolition." *Id.* at 126,

284 Ill.Dec. 360, 810 N.E.2d 13. The statute at issue did not permit a municipal officer to order demolition; rather, it required the municipality to "give at least 15 days notice to the property owner of the need to 'put the building in a safe condition or to demolish it,' " affording some time for repairs. *Id.* at 127, 284 Ill.Dec. 360, 810 N.E.2d 13 (citation omitted). Only after the notice was issued could the municipality seek a demolition order in circuit court, where it had the burden of proving that the building was "dangerous and unsafe" or "uncompleted and abandoned." *Id.* The court could order demolition if substantial reconstruction was necessary to correct defects or if a ****425** structure was beyond reasonable repair, taking into consideration repair costs. *Id.* at 128, 284 Ill.Dec. 360, 810 N.E.2d 13. The Illinois court then concluded that the statute passed constitutional muster because

> [it] is entirely reasonable and protects the rights of the property owner while permitting the municipality to deal ***724** expeditiously with threats to the public health and safety. [The statute] makes a reasonable distinction between properties that are readily repairable and those that are not. The statute guarantees a property owner the opportunity to make repairs, either before or after an adjudication of "dangerous and unsafe," if the property is readily repairable. If, however, the property is in need of substantial reconstruction to render it safe, a property owner who is willing to undertake such a project must obtain the necessary permits and undertake repairs promptly upon receiving notice. The owner of such a property who does not promptly undertake repairs, but instead chooses to contest whether the building is dangerous and unsafe and to litigate the question of whether the building is readily repairable, runs the risk that he will lose on the merits and an order of demolition will issue. [*Id.* at 130, 284 Ill.Dec. 360, 810 N.E.2d 13.]

We read *Stokovich* as upholding the constitutionality of the statute because it affords property owners the opportunity to commence the process of necessary repairs during the 15–day notice period. In the instant action, BCO § 18–59 gives a municipal officer the authority to order demolition, and BCO § 18–52(c)(3) allows the notice to contain a statement that the structure is to be demolished without the option to make repairs. Indeed, the building official, in notifying plaintiffs, stated that he had determined that the structures were unsafe and not reasonable to repair, and he ordered demolition within 60 days. Accordingly, the ordinance at issue in this case is distinguished from the statute in *Stokovich*.

Finally, we note that our own Supreme Court, cautioning that a remedy should not be greater than necessary to achieve a desired result, has stated that "something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard." *State Police Comm'r v. Anderson,* 344 Mich. 90, 96, 73 N.W.2d 280 (1955).

***725 D. RESPONSE TO THE DISSENT**

We find it necessary to address some of the arguments posed by our dissenting colleague. With respect to the criticism that procedural due process did not serve as a basis for the trial court's ruling and that it is not argued on appeal, we conclude that for the reasons stated earlier, procedural due process principles are implicated and need to be examined and applied in order to properly resolve this appeal. The failure to offer correct solutions to a controlling legal issue does not limit the ability of this Court "to probe for and provide the correct solution." *Mack v. Detroit,* 467 Mich. 186, 207, 649 N.W.2d 47 (2002). "[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Id.*

In regard to procedural due process, the dissent criticizes our ruling on the grounds that requiring a reasonable opportunity to repair is not a matter of process or procedure and that the procedural due process rights to notice, a hearing, and an impartial decisionmaker are satisfied under the BCO, with nothing more being required. As indicated previously in this opinion, an option-to-repair requirement, incorporated as part of a razing or demolition ordinance ****426** relative to nuisances and unsafe structures, can logically be viewed as a *procedural* mechanism or safeguard comparable to notice, hearing, and impartiality mandates. See *D & M Fin. Corp.,* 136 Cal.App.4th at 174, 38 Cal.Rptr.3d 562; *Hawthorne S. & L.,* 19 Cal.App.4th at 159, 23 Cal.Rptr.2d 272; *Miles,* 510 F.2d 188, 166 U.S.App.D.C. at 239. At the

same time, the matter concerning an option to repair also has significant substantive attributes in relationship to due process protections, and the cases that we discussed earlier dealt with the issue of a repair option within the analytical framework of *726 either procedural or substantive due process; there were varied approaches as to which due process principle was applicable. Because of this overlap, and for purposes of providing a thorough and complete analysis, it is incumbent upon us to discuss procedural and substantive due process principles.

[20] Next, as to the dissent's claim that plaintiffs were accorded procedural due process by way of notice, a hearing, and an impartial decisionmaker, it must be emphasized that procedural due process is not always satisfied in full simply because notice, a hearing, and an impartial decisionmaker were provided. In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex,* 442 U.S. 1, 12–13, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the United States Supreme Court explained:

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." The function of legal process, as that concept is embodied in the Constitution, ... is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error. [Citations omitted.]

Notice and an opportunity to be heard are "the most *basic* requirements of procedural due process." *In re Rood,* 483 Mich. 73, 92, 763 N.W.2d 587 (2009) (emphasis added). "The *fundamental* requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews,* 424 U.S. at 333, 96 S.Ct. 893 (emphasis added; citation omitted). The *Mathews* Court observed that, "unlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334, 96 S.Ct. 893 (quotation marks and citation omitted). "[T]he requirements *727 for minimum due process may vary depending on the context." *Commonwealth v. Brown,* 426 Mass. 475, 482, 688 N.E.2d 1356 (1998). The "essential" elements of due process, i.e., " rudimentary" due process, require notice and a hearing. *Rental Prop. Owners Ass'n of Kent Co. v. Grand Rapids,* 455 Mich. 246, 271, 566 N.W.2d 514 (1997). Accordingly, there can be instances and situations in which procedural due process requires more than the minimum procedures noted by the dissent. And under the particular circumstances of this case and the *Mathews* factors, which we thoroughly analyzed earlier, we conclude that to satisfy procedural due process rights, an ordinance pertaining to the demolition of unsafe structures must include a provision that allows a property owner to exercise an option to repair, subject, of course, to reasonable limitations.

The dissent criticizes our reliance on *Washington,* 861 S.W.2d 125, *Johnson,* 512 S.W.2d 514, *Herrit,* 704 A.2d 186, and *Horne,* 140 Ga.App. 127, 230 S.E.2d 333, arguing that they do not support our procedural **427 due process ruling. We did not cite these cases with procedural due process specifically in mind; they were cited for their general due process analysis, and they tend to rely on substantive due process principles. These cases strongly support our finding of a substantive due process violation. The cases that we did expressly cite on the issue of procedural due process, *D & M Fin. Corp.,* 136 Cal.App.4th 165, 38 Cal.Rptr.3d 562, *Hawthorne S. & L.,* 19 Cal.App.4th 148, 23 Cal.Rptr.2d 272, and *Miles,* 510 F.2d 188, 166 U.S.App.D.C. 235, are not mentioned by the dissent.

The dissent concludes that one of the reasons that there is no constitutional violation is that a set of factual circumstances exist under which the ordinance is constitutional, i.e., when a structure is rendered unsafe due to events beyond the owner's control, such as weather-related events, in which case an option to *728 repair is expressly provided. See BCO § 18–59. We acknowledged in footnote 13 of this opinion that there is a provision in BCO § 18–59 that allows repairs for structures damaged by events beyond an owner's control, and we recognize that the fact that an ordinance might operate in an unconstitutional manner under some conceivable circumstances is insufficient to find it unconstitutional. See *Council of Orgs. & Others for Ed. About Parochiaid, Inc. v. Governor,* 455 Mich. 557, 568–569, 566 N.W.2d 208 (1997) (noting that if any factual situation can be conceived of that would sustain an act in the face of a constitutional challenge, the existence of that situation at the time of enactment must be assumed). The problem with the dissent's argument is that we are *not* addressing the constitutionality of the ordinance language in BCO § 18–59 concerning weather-damaged, unsafe structures; we are *not* finding that provision unconstitutional. Instead, we are solely finding unconstitutional the language or provision in BCO § 18–59 that deals with all other unsafe structures. An analogy is the best way to point out the flaws in the dissent's position.

Under the dissent's reasoning, a statute that, for example, precludes application of the Fourth Amendment when brick houses are to be searched would be rendered constitutional, which conclusion is obviously legally unsound, if a different or additional section in the same statute required, consistent with constitutional principles, contemplation of the Fourth Amendment when all other types of houses are to be searched. This is nonsensical. The principles alluded to in *Council of Orgs.*, 455 Mich. at 568–569, 566 N.W.2d 208, simply mean, as applied here, that if there is a set of circumstances under which the language actually being addressed, i.e., the language regarding unsafe structures as caused or created by events within the control ***729** of an owner, can be found constitutional, that language will survive a facial constitutional challenge.

The preceding argument naturally leads to the dissent's primary argument, made in the context of both procedural and substantive due process, that BCO § 18–59 is constitutional because an option to repair remains a possibility, even in regard to blameworthy owners, where BCO § 18–61 allows an appeal to the city council wherein the presumption created by BCO § 18–59 can be overcome and the council can allow the owner an opportunity to make repairs. We earlier acknowledged that an owner can appeal to the city council and, although the dissent does not mention it, we even noted that a property owner could attempt to overcome the presumption by pleading his or her case directly to the city manager or the manager's designee under BCO § 18–59. However, and this point is *not* addressed by the dissent despite its being the linchpin of our holding, in order to overcome the presumption—a presumption ****428** that repairs are *unreasonable*—when appealing to the city council or pleading to the city manager, the property owner would necessarily have to establish that the act of making repairs is *reasonable* before being granted an opportunity to make repairs. The constitutional defect is the reasonableness requirement associated with repairs; a property owner should be entitled to make repairs even if others would find it economically unreasonable to do so. The city council rejected plaintiffs' request to make repairs, finding, in part, that it was unreasonable to repair the structures.

BCO § 18–59 is implicated when a determination has been made that a structure is unsafe and that repair costs would exceed 100 percent of the structure's earlier true cash value. These determinations implicate the presumption that engaging in repairs is unreasonable, which presumption is necessarily tied to and impacts ***730** the following presumption that the structure is a public nuisance, subjecting the property to an order of demolition. The presumptions are intertwined and the public-nuisance presumption is dependent on the unreasonable-to-repair presumption because if repairs are not permitted due to a failure to overcome the unreasonable-to-repair presumption by a showing that repairs are indeed reasonable, a structure would remain in a state of disrepair and would thus presumably be a public nuisance.[18] But if the unreasonable-to-repair presumption were overcome and repairs were permitted, the public-nuisance presumption would evaporate and become irrelevant, as the repairs would make the structure safe and obviate any nuisance. Accordingly, the reasonableness requirement as to repairs, which we find unconstitutional, actually permeates the entire process under BCO § 18–59 and then carries over to an appeal under BCO § 18–61.[19]

***731** In sum, we respectfully disagree with the dissenting opinion.

III. CONCLUSION

We interpret BCO § 18–59 as only allowing the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. ****429** We conclude that this standard is arbitrary and unreasonable. While police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe, the ordinance's exclusion of a repair option when repairs are deemed economically unreasonable bears no reasonable relationship to this legislative objective. Demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing procedural safeguards in the form of an option to repair when a property owner's desire to repair could be viewed as unreasonable and lead to the unlawful deprivation of a constitutionally protected property interest, and which safeguard would burden the city to a lesser extent than demolition, the city's ordinance also violates procedural due process.

We affirm. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219(A).

*732 SHAPIRO, J., concurred with MARKEY, P.J.

MURRAY, J. (dissenting).

The trial court held that Brighton City Ordinance § 18–59 was facially unconstitutional on the basis that the ordinance's presumption, that an unsafe structure with an estimated repair cost of 100 percent of the structure's predeteriorated condition value should be demolished, violated plaintiffs' right to substantive due process. The majority's decision to affirm that decision is in error because there are circumstances under which the ordinance is valid. Additionally, the majority should not address whether this same section violates plaintiffs' rights to procedural due process, as the trial court did not rule on that issue. And, even if it were an issue properly before us, the ordinance does not violate plaintiffs' rights to procedural due process under the United States Constitution. I therefore lodge this dissent.

I. PROCEDURAL DUE PROCESS

As the majority notes, the trial court held BCO § 18–59 unconstitutional as a violation of plaintiffs' rights to substantive due process under the Fourteenth Amendment to the United States Constitution. That was the precise and only constitutional basis for the trial court's ruling that set aside the ordinance, and that is the only ruling challenged by defendant on appeal. We should limit our review to the decision rendered below and challenged on appeal, and proceed no further. *Candelaria v. BC Gen. Contractors, Inc.*, 236 Mich.App. 67, 83, 600 N.W.2d 348 (1999).[1] The majority *733 correctly cites to *Mack v. Detroit*, 467 Mich. 186, 207–208, 649 N.W.2d 47 (2002), for the proposition that a court may raise and decide an issue not raised by any party but that otherwise falls within a broader issue raised by a party. My concern, however, is utilizing our discretion to do so, for "[a]s any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised or decided by the trial court, on the basis that it is not properly preserved." *People v. Michielutti*, 266 Mich.App. 223, 230, 700 N.W.2d 418 (2005) (MURRAY, J., concurring **430 in part and dissenting in part), rev'd in part on other grounds 474 Mich. 889, 704 N.W.2d 705 (2005), citing *Adam v. Sylvan Glynn Golf Course*, 197 Mich.App. 95, 98, 494 N.W.2d 791 (1992), and *People v. Stacy*, 193 Mich.App. 19, 28, 484 N.W.2d 675 (1992). See, also, *People v. Byrne*, 199 Mich.App. 674, 677, 502 N.W.2d 386 (1993) ("We generally do not address the merits of unbriefed issues."). But, because the majority has spent a good deal of time addressing this issue, my analysis and conclusion—that the ordinance in every way survives this facial procedural due process clause challenge—follows.

Before getting to the merits, it is vital to keep in mind several important principles of judicial review. First, all courts must exercise great caution before utilizing the judicial power to declare a law unconstitutional. *Council of Orgs. & Others for Ed. About Parochiaid, Inc. v. Governor*, 455 Mich. 557, 570, 566 N.W.2d 208 (1997). Indeed, we presume that an ordinance is constitutional, *In re Harrand*, 254 Mich. 584, 589, 236 N.W. 869 (1931),[2] and therefore the party challenging the constitutional *734 validity of the law bears a heavy burden. *Houdek v. Centerville Twp.*, 276 Mich.App. 568, 573, 741 N.W.2d 587 (2007).

Second, as the majority notes, this is a facial challenge to the constitutionality of the ordinance. We have repeatedly made clear that the party bringing a facial challenge must satisfy an " 'extremely rigorous standard.' " *Keenan v. Dawson*, 275 Mich.App. 671, 680, 739 N.W.2d 681 (2007), quoting *Wayne Co. Bd. of Comm'rs v. Wayne Co. Airport Auth.*, 253 Mich.App. 144, 161, 658 N.W.2d 804 (2002). A facial challenge attacks the very existence of the ordinance, requiring plaintiffs to establish that "the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market." *Hendee v. Putnam Twp.*, 486 Mich. 556, 589, 786 N.W.2d 521 (2010) (CORRIGAN, J., *concurring*) (quotation marks and citation omitted). Because a facial challenge attacks the ordinance itself, as opposed to how it is applied, a court must uphold the law if there are *any* circumstances under which it could be valid. *Keenan*, 275 Mich.App. at 680, 739 N.W.2d 681. In other words, even if facts can be conjured up that would make the law arguably unconstitutional, "if any state of facts reasonably can be conceived that would sustain [an ordinance]," those facts must be assumed and the ordinance upheld. *Council of Orgs.*, 455 Mich. at 568, 566 N.W.2d 208 (quotation marks and citation omitted). And, because this is a facial challenge, the actual facts surrounding plaintiffs' case are irrelevant. *Yates v. Norwood*, 841 F.Supp.2d 934, 938 n. 8 (E.D.Va.2012), citing *Forsyth Co., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n. 10, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

With these important principles guiding the decision, the next question is whether ordinances BCO §§ 18–59 *735 and 18–61 are facially unconstitutional under the Due Process Clauses of the United States Constitution.[3] With respect to the procedural **431 component of these clauses, the focus is on—not surprisingly—ensuring that persons receive adequate *procedural protection* from government decisions that could deprive them of their property. See, generally, *Gorman v. Univ. of Rhode Island,* 837 F.2d 7, 12 (C.A.1, 1988). Specifically, the federal courts have held that the " fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). See also *Mettler Walloon, L.L.C. v. Melrose Twp.,* 281 Mich.App. 184, 213–214, 761 N.W.2d 293 (2008) (procedural due process requires notice, an opportunity to be heard before an impartial decision-maker, at a meaningful time and in a meaningful manner).

To be meaningful, the opportunity to be heard must occur before the person is permanently deprived of any significant property interest. *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Mathews,* 424 U.S. at 333, 96 S.Ct. 893. The extent of the hearing constitutionally required varies, and depends on an evaluation of the following:

> *736 First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews,* 424 U.S. at 335, 96 S.Ct. 893.]

The two ordinances at issue are BCO §§ 18–59 and 18–61. BCO § 18–59 provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.

If, as in this case, the city manager orders a building demolished, a party can—as plaintiffs did here—appeal that determination to the city council pursuant to BCO § 18–61, which provides in pertinent part:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal.... The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

The majority acknowledges that these ordinances provide persons with notice,[4] an **432 opportunity to be heard *737 at a hearing before city council, and a decision from an impartial decision-maker. Recognizing that the ordinances provide notice and an opportunity to be heard before an impartial decision-maker should preclude any facial challenge to the ordinances based on procedural due process, especially when the *procedures* themselves are not alleged to be deficient. See, e.g., *English v. Dist. of Columbia,* 815 F.Supp.2d 254, 266 (D.D.C.2011) (dismissing procedural due process claim when the plaintiff was afforded predeprivation notice of the nature of the dispute, and an opportunity to be heard); *American Towers, Inc. v. Williams,* 146 F.Supp.2d 27, 33 (D.D.C.2001) (holding the same).

However, according to the majority, providing persons with notice, a full hearing before city council, and an impartial decision-maker is not enough to satisfy procedural due

process. Instead, the majority holds that "the city should have also provided for a reasonable opportunity to repair an unsafe structure...." This position is not sustainable. For one, the majority's focus is on the standards to be applied by the council (whether the council *must* allow a homeowner the option to repair when the cost exceeds 100 percent of the structure's value), as opposed to the *process* provided by the ordinance to persons who are contesting an inspector's decision. And, as set forth above, procedural due process is concerned only with the procedures employed by the government to allow the citizen to be heard before being deprived of his property. *Gorman,* 837 F.2d at 12.

Additionally, the majority's analysis does not adhere to the standards governing facial challenges. Specifically, we must uphold the ordinances as long as there is any set of circumstances that would make the ordinances constitutional, *Keenan,* 275 Mich.App. at 680, 739 N.W.2d 681, ***738** and the majority recognizes that under the ordinances as written city council could allow an owner to make repairs that exceed 100 percent of the structures value. Indeed, BCO § 18–59 contains only a *presumption* that a structure that needs repairs costing in excess of 100 percent of the structure's true cash value prior to becoming unsafe should be demolished. But, under BCO § 18–61, a person can make their case to city council and overcome the presumption, allowing for repairs rather than demolition. The ordinance itself also allows repairs without regard to cost when the structure is unsafe because of weather-related causes, i.e., not through owner neglect or negligence. Because the ordinances provide a meaningful hearing at a meaningful time, and because even when using the majority's added "safeguard" of an automatic repair option there are circumstances under which repairs can be made, we must uphold the validity of the ordinances against this facial challenge.

Finally, the decisional law from our sister states used by the majority to buttress its position on this issue is either inapplicable or unpersuasive. For instance, the Kentucky Court of Appeals' decision in *Washington v. City of Winchester,* 861 S.W.2d 125 (Ky.App.1993), that the ordinance was arbitrary, was based on § 2 of the Kentucky Constitution that specifically prohibits absolute and arbitrary power. See *id.* at 126. Nor is there any discussion in *Washington* of the *Mathews* factors or other case law articulating the procedural due process standards that govern this issue. And, the only case *Washington* relies upon, *Johnson v. City of Paducah,* 512 S.W.2d 514 (Ky.1974), was also specifically ****433** based on § 2 of the Kentucky Constitution and likewise contains no discussion about what is required under the federal due process clause.

***739** Similarly, in *Herrit v. City of Butler Code Mgt. Appeal Bd.,* 704 A.2d 186 (Pa.Commw.1997), the court did not analyze the case with procedural due process caselaw (though it does make mention of the plaintiffs asserting a Takings Clause claim), and appears to have instead utilized a standard to determine whether the ordinance was "arbitrary, unreasonable and ha[d] no substantial relation to the promotion of the public health, safety, morals or general welfare of" the city. *Id.* at 189. Again, the test used in *Herrit* is not one used to determine whether an ordinance violates the right to procedural due process, so it has no application to this issue. This is also the deficiency in *Horne v. City of Cordele,* 140 Ga.App. 127, 130–131, 230 S.E.2d 333 (1976), in which the court relied on general notions of arbitrariness and public necessity to strike down the ordinance. That case *may* be helpful in considering plaintiffs' *substantive* due process claim (though in the end it really is not), but it offers no persuasive value with respect to the *procedural* due process issue. [5]

In sum, there is no dispute that plaintiffs received proper notice of the city inspector's decision, had the opportunity to appeal that decision to city council where a full hearing was held, and received a decision from what the majority concedes was an impartial decision-maker. Considering the *Mathews* factors, the city's ordinance satisfied the requirements of due process. ***740** [6] Plaintiffs received all the process that they were constitutionally due, and this Court should not rule to the contrary.

II. SUBSTANTIVE DUE PROCESS

Turning now to the ruling actually made by the trial court, it is clear that the answer to plaintiffs' substantive due process claim [7] is not as simple. In the end, however, it meets with the same fate. Unlike procedural due process, substantive due process bars " 'certain government actions regardless of the fairness of the procedures used to implement them.' " *Mettler Walloon,* 281 Mich.App. at 197, 761 N.W.2d 293, quoting *Co. of Sacramento v. Lewis,* 523 U.S. 833, 840, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). The established test that a plaintiff must prove is " '(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is

unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.' " *Dorman v. Clinton Twp.*, 269 Mich.App. 638, 650–651, 714 N.W.2d 350 (2006), quoting *Frericks v.* ****434** *Highland Twp.*, 228 Mich.App. 575, 594, 579 N.W.2d 441 (1998). Here, no one questions that the ordinances advance a legitimate governmental interest. Thus, the sole issue on the substantive due process claim is whether the ordinances are an unreasonable means of advancing the undisputed governmental interest.

***741** In conducting this analysis, the standard we must employ is again vitally important. Judicial review of a challenge to an ordinance on substantive due process grounds requires application of three rules:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge. [*Yankee Springs Twp. v. Fox*, 264 Mich.App. 604, 609, 692 N.W.2d 728 (2004), quoting *A & B Enterprises v. Madison Twp.*, 197 Mich.App. 160, 162, 494 N.W.2d 761 (1992).]

Applying this difficult and deferential standard, and recognizing that we conduct a de novo review of the trial court's decision, I would hold that BCO § 18–59 survives plaintiffs' facial challenge. There are at least two reasons supporting this conclusion. First, city council's decision to implement a presumption of demolition if the repair costs exceed 100 percent of the value of the structure before it because unsafe is neither unreasonable nor arbitrary. For one, the ordinance is not a flat prohibition precluding all property owners within the Brighton city limits an opportunity to repair an unsafe structure, as BCO § 18–59 exempts certain unsafe structures from the presumption, in particular structures that came to be in that condition through no fault of the structure's owner, and structures that become unsafe from weather-related events or fire damage from sources other than the owner.

Additionally, for structures that are not exempt from the presumption, the ordinance grants city council the discretion to approve repairs instead of ordering demolition. For example, city council could—as plaintiffs ***742** admit—simply decide after a hearing that the property owner should have an opportunity to repair before demolition occurs, or that repairs are only necessary. Thus, if there is a substantive due process right to repair one's property before demolition, then under this hypothetical that right is not violated. Because there are factual circumstances under which this ordinance is constitutional, under the governing standards plaintiffs cannot prevail on their facial challenge to the ordinance. *Keenan*, 275 Mich.App. at 680, 739 N.W.2d 681.

Second, it is difficult to conclude that the presumption is so arbitrary that it shocks the conscience. Although the position taken by the trial court and the majority is understandable, i.e., it might be good policy for the city to allow an owner to expend whatever resources they deem appropriate to repair their own premises, accepting that principle does not result in a conclusion that a presumption to the contrary for *some* unsafe structures is unconstitutional. In other words, that there may have been other reasonable means to accomplish the city's objective of removing unsafe structures from the city does not mean that the city's choice of employing these terms was arbitrary or the result of some "whimsical ipse dixit." *Yankee Springs Twp.*, 264 Mich.App. at 609, 692 N.W.2d 728.[8] See, ****435** also, *Bolden v. City of Topeka*, 546 F.Supp.2d 1210, 1218–1219 (D.Kan.2008) (rejecting a substantive due process challenge to an ordinance that had a no-repair cost threshold of 15 percent, and stating that just because the city could have utilized a higher threshold does not mean that a lower one is unconstitutional.). City council is, of ***743** course, the policy-making body for the city, and we must be extraordinarily careful not to utilize somewhat vague constitutional standards to override policy decisions that are outside our authority to make. *Warda v. Flushing City Council*, 472 Mich. 326, 334, 696 N.W.2d 671 (2005). And, given the exceptions within the ordinance and the undisputed authority of the city to regulate unsafe structures, it is a reasonable position for Brighton's leaders to enact an ordinance containing a presumption that *certain* dwellings that need *substantial* repairs (and usually because of owner neglect) should be demolished, but leaving that ultimate decision to be made by city council after a hearing.

Finally, the trial court ruled that "withholding from the owner the option to repair does not advance the [city's] proferred interest any more than permitting the owner to repair it themselves," and because of that there lacked a real and substantial relation to the object sought to be obtained by the ordinance. This rationale elevates the standard of review beyond what is required by this facial challenge. As set out above, there are many factual circumstances under which this ordinance can be constitutional, and that alone is enough to allow the ordinance to survive this facial challenge. And, even setting aside the exceptions within the ordinance and the fact that city council can order repairs instead of demolition, it is not unreasonable for the city to have implemented a rebuttable presumption for a certain class of unsafe properties.[9]

I would reverse the trial court's order and remand for entry of an order granting defendant's motion for ***744** summary disposition on the substantive due process claim and for further proceedings on any remaining claims.

Parallel Citations

828 N.W.2d 408.

Footnotes

1 BCO § 18–46 defines an "unsafe structure," setting forth a number of qualifying criteria. BCO § 18–47 makes it "unlawful for an owner or agent to maintain or occupy an unsafe structure." BCO § 18–48 requires those responsible for a structure to "take all necessary precautions to prevent any nuisance or other condition detrimental to public health, safety, or general welfare from arising thereon."

2 A stop-work order was posted as to any repairs that may have been contemplated or initiated.

3 Before the complaint in the case at bar was filed, plaintiffs had commenced a mandamus action against the city, which the trial court dismissed.

4 In Resolution 09–26, the city council found that "the testimony and evidence presented [was] insufficient to show cause why the structure [s] should not be demolished for the reasons that that testimony and evidence was irrelevant and/or not credible, and that [plaintiffs] have, accordingly, not fulfilled their burden of proof." Resolution 09–26, in its written form, further indicated that plaintiffs were to be given approximately six months to "take any and all actions necessary to bring the [s]tructures into compliance with the 2006 Michigan Building Code." We note, however, that a transcript of the hearing in which the resolution was announced, recited, voted upon, and approved fails to include this provision. Resolution 09–26, in its written form, additionally authorized the city attorney to institute appropriate legal proceedings to seek demolition of the structures if the work was not completed in timely fashion. The transcript of the hearing, however, reflects that the council authorized the city attorney to immediately pursue legal proceedings seeking demolition. The transcript also indicates that two resolutions were prepared before the hearing: one that authorized litigation and one that authorized an "extension for repair." Given the surrounding circumstances and the events that transpired, it is clear that the city council did not allow plaintiffs an opportunity to make repairs. Evidently, after the hearing, the council mistakenly executed the wrong resolution.

5 We note that the trial court granted partial summary disposition to the city on its motion relative to plaintiffs' claims for money damages based on a violation of the Michigan Constitution and in regard to the contempt of court and slander of title. Additionally, plaintiffs agreed to the dismissal of their claim under MCL 125.540 (enforcement agency's notice requirements for dangerous conditions).

6 Plaintiffs presented, and the trial court ruled upon, myriad arguments on several subjects in the motion for partial summary disposition; however, we shall not address them as only the constitutionality of BCO § 18–59 is at issue on appeal.

7 We note that this case presents a facial challenge to the ordinance. See *Hendee v. Putnam Twp.*, 486 Mich. 556, 568 n. 17, 786 N.W.2d 521 (2010) (distinguishing between facial and as-applied challenges and noting that a facial challenge attacks the very existence of an ordinance as infringing upon property rights).

8 The *Kyser* Court explained that while the standard of review for zoning regulations is characterized as a "reasonableness" test, it is analogous to the "rational basis" test for testing the constitutionality of legislation not involving suspect classifications or fundamental rights to which courts apply heightened or strict scrutiny. *Kyser*, 486 Mich. at 522 n. 2, 786 N.W.2d 543.

9 In contrast to procedural due process, substantive due process protects individual liberty and property interests from arbitrary government actions regardless how fairly implemented. *People v. Sierb*, 456 Mich. 519, 523, 581 N.W.2d 219 (1998); *Mettler Walloon*, 281 Mich.App. at 197, 761 N.W.2d 293.

10 Under BCO § 18–52(a) and (b), the city must issue and serve a notice on an owner of a structure, or the owner's agent, that reflects a determination that the owner's structure is unsafe. BCO § 18–52(c)(3) provides that the notice must "[s]pecify the repairs and improvements required to be made to render the structure safe *or if the city manager, or his designee, has determined the structure*

cannot be made safe, indicate that the structure is to be demolished [.]" (Emphasis added.) In situations in which the city allows an opportunity to repair an unsafe structure, the notice must "[s]pecify a reasonable time within which the repairs and improvements must be made or the structure must be demolished." BCO § 18–52(c)(4).

11 Considering that the issue on appeal concerns repair rights, our focus is more on the presumption that repairs are unreasonable, and therefore not permitted, than on the presumption that the unrepaired structure is a public nuisance.

12 Municipalities may exercise their legitimate police powers to abate a public nuisance. *Ypsilanti Charter Twp. v. Kircher,* 281 Mich.App. 251, 272, 761 N.W.2d 761 (2008). There is a well-established exception to the constitutional prohibition against takings without just compensation, which provides that because no person has the right to utilize property in a manner that creates a nuisance, the state, when asserting power to stop a nuisance, has not taken anything. *Id.* Consequently, governmental entities are not required to provide just compensation when they diminish or destroy a property's value to abate a public nuisance. *Id.*

13 We note that BCO § 18–59 provides an exception when "a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God." In such situations, "the owner shall be given ... reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair." BCO § 18–59. Thus, even if the cost of repairs exceeds the property's value, a right to repair exists when a structure is made unsafe through events that the owner could not control. Stated otherwise, repairs are permissible even though they are otherwise unreasonable.

14 We recognize that there may occasionally be unique circumstances in which repair efforts cannot be allowed, despite a willingness by the property owner to do so, such as where repairs necessary to meet code requirements cannot be designed or cannot be accomplished in a safe or timely manner. There may also be emergency situations, see BCO § 18–56, where immediate destruction is necessary to avoid an imminent danger and repairs are not feasible. The instant action does not present a unique or an emergency situation. Moreover, and importantly, the reasonableness standard employed in BCO § 18–59 focuses on economic and financial reasonableness because the ordinance is predicated on the examination of repair costs and property valuations.

15 See n 14 *supra.*

16 The court ultimately determined that the code provision regarding repair costs and property values was unconstitutional under § 2 of the Kentucky Constitution. *Washington,* 861 S.W.2d at 126. Section 2 of the Kentucky Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." This principle is essentially embodied in Const 1963, art 1, § 17, which provides that "[n]o person shall be ... deprived of life, liberty or property, without due process of law."

17 We acknowledge a contrary result in *City of Appleton v. Brunschweiler,* 52 Wis.2d 303, 190 N.W.2d 545 (1971), but find that case unpersuasive because the court addressed the issue as one of statutory interpretation and only superficially mentioned possible constitutional problems.

18 Conceivably, a property owner could attempt to overcome the public-nuisance presumption by showing that although the structure is unsafe and no repairs are to be made, the structure is nevertheless not a public nuisance. Showing a desire or wish to repair would have no bearing on or relationship to overcoming the public-nuisance presumption.

19 We note that it is even arguable that BCO § 18–61 only allows an appeal of an unsafe-structure determination where it provides, "An owner of a structure determined to be unsafe may appeal the decision to the city council." Again, the presumptions in BCO § 18–59 only arise after it is determined that a structure is unsafe *and* the cost of repairs exceeds value. Therefore, if an owner simply wants an opportunity to repair and accepts that his or her structure is unsafe and that repair costs exceed value, or the owner cannot prove otherwise, one could reasonably construe BCO § 18–61 as not even permitting the owner to challenge the presumptions created by BCO § 18–59 in an appeal to the city council, as the council could only entertain a determination that a structure was unsafe. The language in BCO § 18–61 does not address appealing a demolition determination in general. If a property owner could show that a structure is safe, the whole issue of repairs and an option to repair becomes moot given that demolition could not be ordered under BCO § 18–59 absent a finding that a structure is unsafe. The fact that the city council heard plaintiffs' appeal and considered a repair option in this case does not mean that the council actually had the jurisdiction or the authority to do so, and the council could theoretically decline to hear future cases of a similar nature based on the language in BCO § 18–61.

1 The trial court did address plaintiffs' argument that defendant's decision that plaintiffs lost their *nonconforming use* status violated procedural due process. However, the court ruled that a genuine issue of material fact existed, and defendant did not appeal that ruling.

2 We make this presumption because of "our recognition that elected officials generally act in a constitutional manner when regulating within their particular sphere of government," *Truckor v. Erie Twp.,* 283 Mich.App. 154, 162, 771 N.W.2d 1 (2009), which clearly the Brighton City Council was doing when enacting the ordinances at issue.

3 The federal due process clause that applies to the States is contained in the Fourteenth Amendment to the United States Constitution, and provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const., Am. XIV, § 1. Although the constitutional language only references process, *People v. Sierb,* 456 Mich. 519, 522–523, 581 N.W.2d 219 (1998), the United States Supreme Court has held that there is both a procedural and substantive part to the Fourteenth Amendment,

Mettler Walloon, L.L.C. v. Melrose Twp., 281 Mich.App. 184, 197, 761 N.W.2d 293 (2008). As noted, the trial court's ruling was based exclusively on the substantive requirements of the federal due process clause.

4 Another section of the ordinance spells out the detailed contents for the notice and how and when it is to be served upon the property owner. BCO § 18–52.

5 "Analyzing violations of substantive and procedural due process involves separate legal tests." *Garza–Garcia v. Moore*, 539 F.Supp.2d 899, 907–908 n. 11 (S.D.Tex.2007). See, also, *Cobb v. Aytch*, 472 F.Supp. 908, 925–926 (E.D.Pa.1979) aff'd in part, vacated in part, and rev'd in part on other grds 643 F.2d 946 (C.A.3, 1981). Thus, the majority should not conflate caselaw and its reasoning between the two different constitutional concepts. And, the fact that analyzing procedural due process claims requires a "flexible approach" does not mean that the different standards for analyzing these separate claims should be melded together.

6 Though the actual facts of what transpired during plaintiffs appeal are not relevant to this facial challenge, *Forsyth Co.*, 505 U.S. at 133 n. 10, 112 S.Ct. 2395, during the appeal and hearing before city council the parties submitted expert reports, affidavits, PowerPoint Presentations, live testimony, and oral arguments. The city council also provided a written decision.

7 This is also a facial challenge to the city ordinances.

8 "Ipse dixit" is defined as "[s]omething asserted but not proved," Black's Law Dictionary (8th ed), so an ordinance resulting from a "whimsical ipse dixit" must result from an impulsive decision that has no proven basis to support it.

9 Structure owners whose property the presumption applies to always have the option to repair before the city gets involved or a finding that the structure is unsafe is made. If repairs are made on a regular or as-needed basis the structure should never become unsafe.

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EXHIBIT E

Not Reported in N.W.2d, 2013 WL 1223193 (Mich.App.)
(Cite as: 2013 WL 1223193 (Mich.App.))

Court of Appeals of Michigan.
CHARTER TOWNSHIP OF YPSILANTI, Plaintiff/Counterdefendant–Appellee,
v.
GROVE PARK HOME IMPROVEMENT ASSOCIATION, Defendant/Counterplaintiff/Cross–Plaintiff/Third–Party Plaintiff–Appellant,
and
Grove Park Homes, LLC, Good Home Solutions, LLC, Jimar Enterprise, LLC, Gary Coward, Annie M. Kellas, Jag Properties & Investment, LLC, William Parker, Gloria Parker, Lisa Hicks, William J. Hicks, Gwendolyn A. Hicks, Carolyn Y. Chadwick, Aune Manupelli–Hamilton, James Moore, a/k/a Jimmy Moore, Joseph Secore, and State Street Properties & Investment, LLC, Defendants/Counterplaintiffs/Third–Party Plaintiffs–Appellants,
and
Cale Streeter, Defendant–Appellant,
and
Joseph L. Koenig, Defendant/Counterplaintiff/Third Party Plaintiff,
and
Adams A. Aliyu; Brothers and Sisters Homes, LLC, Thomas Chadwick, Elizabeth Durr, Gary Durr (Deceased), Abel Ekpunobi, Federal National Mortgage Association, Kincaid Frye, Shantel Gibbs, Tia Gibbs, Gmac Mortgage, LLC, Delores Hardrick, Key Properties, LLC, Ben Laster, Stephanie Laster, Melvin Lewis, Betty Lewis, Linda McGuire, Anthony McGuire, Monica A. McKivens, Varnessa Patterson, Willie Powell, Geraldine Powell, Virley W. Reed, and Gail D. Reed, Defendants,
and
Washtenaw County Treasurer, Defendant/Cross–Defendant–Appellee,
and
Ron Fulton, Third–Party Defendant–Appellee.

Docket No. 305990.
March 26, 2013.

Before: SAWYER, P.J., and MARKEY and M.J. KELLY, JJ.

PER CURIAM.

*1 Defendants-appellants appeal by right the trial court's opinion and order declaring that a condominium-like residential townhouse development, Liberty Square, was a public nuisance and ordering its abatement by demolition, MCL 600.2940. Defendants-appellants also appeal the trial court's dismissal of their counter-claims, cross-claims, and third-party claims because the court found appellants' claims were without merit. We affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

Liberty Square is comprised of 17 buildings with 151 separate residential units and was incorporated in 1971 as the Grove Park Home Improvement Association (GPHIA). Although built before the Michigan's condominium act, the complex is governed by a recorded declaration of covenants, conditions and restrictions. The GPHIA was established as the legal representative of all unit owners and is responsible for the maintenance and preservation of the common areas and the exterior of the buildings. Each unit owner was required to join the GPHIA and pay an annual assessment to fund the maintenance and improvements for which the GPHIA was responsible. Problems developed over the years as the occupancy

rate declined, assessments increased, and maintenance stopped.

A 2006 "Market and Feasibility Study Summary Report" was prepared by a private consulting firm and was admitted during the proceedings in the trial court as plaintiff's Exhibit 9. The report in its first paragraph documents problems at Liberty Square leading up to plaintiff's building code enforcement actions.

> Liberty Square Townhomes has long been considered one of Ypsilanti Township's worst neighborhoods. The townhome community has experienced severe decline in the form of conversion of owner-occupied homes to rental units, deterioration of existing housing stock, and reputation as a high crime area. Moreover, in 2005 Flagstar Bank foreclosed upon 58 of the 151 units at Liberty Square. Over one-half of all units at Liberty Square are currently vacant.

In addition to bank foreclosure, in 2010 the Washtenaw County treasurer foreclosed on 63 units owned by Grove Park Homes, LLC, a company owned by the spouse of Joseph Koenig, GPHIA's resident agent and manager, because property taxes went unpaid. The treasurer testified that Koenig admitted stripping these units of appliances and cabinets sometime before the tax foreclosure. The treasurer transferred the 63 units to plaintiff after they were not purchased at a tax sale. After the initiation of this action in December 2010, foreclosure of Liberty Square units for non-payment of taxes continued: 32 additional units were foreclosed for delinquent taxes in 2011 and another 27 were in the process of foreclosure proceedings.

Plaintiff initiated building code enforcement action in 2008, issuing notice of violations (NOV) to 68 units, which produced no maintenance action. The units were in the hands of a receiver as part of mortgage foreclosure proceedings and included the initial 63 units foreclosed on for non-payment of property taxes. On April 23, 2010, plaintiff issued a NOV to GPHIA and Koenig its resident agent and property manager, with respect to all 17 buildings of Liberty Square, citing numerous violations of plaintiff's property maintenance code. GPHIA's attorney, Mariah Fink, responded in a letter on May 21, 2010, asserting that the NOV was vague, overbroad and should be addressed to the actual owners of Liberty Square units. In response, on June 1, 2010, plaintiff mailed notice to all listed property owners. Also, its building official, Ron Fulton, posted each unit with a copy of the letter and a notice that the unit was "unsafe to live in" and "condemned." On April 16, 2010, township officials inspected Liberty Square and took extensive photographs of the exteriors of the seventeen buildings. These photographs were included in an addendum to the prior NOV, which was posted at each unit on August 20, 2011. Only one unit owner, Tom Chadwick, responded to the August 2011 addendum to the NOV.

*2 On December 22, 2010, plaintiff filed its complaint pursuant to MCL 600.2940 and MCR 3.601, seeking an order declaring that the Liberty Square property was a public nuisance. Some of the named defendants (appellants) filed counter-claims and third-party complaints for damages pursuant to 42 USC 1983, alleging violations of procedural and substantive due process, inverse condemnation, and intentional torts of interference with contract and an advantageous business relationship or expectancy. Defendant GPHIA filed a cross-complaint against the Washtenaw County treasurer asserting a claim for accounts stated with respect to non-payment of association maintenance fees regarding units that had been foreclosed for nonpayment of taxes. Defendant Cale Streeter filed a counter-claim against plaintiff alleging violations of procedural and substantive due process, unconstitutional taking and inverse condemnation, as well as a third-party complaint against plaintiff's building official, Ronald Fulton, alleging gross negligence and tortious interference with contractual

relations.

The trial court conducted three hearings on plaintiff's complaint: a show cause hearing on January 26, 2011, and evidentiary hearings on June 16, 2011 and July 29, 2011. The trial court also entered other ancillary orders, including authorizing alternative service on some defendants by publication and posting and entering an order permitting plaintiff to enter and inspect all vacant units and those not lawfully occupied. On June 24, 2011, after the first evidentiary hearing and before the second, the trial court conducted a view of the property. None of the parties objected. The trial court issued its opinion and order on August 19, 2011, declaring the 17 structures (151 units) of Liberty Square a public nuisance to be abated by demolition.

II. STANDARD OF REVIEW

Although nuisance proceedings are equitable in nature, MCL 600.2940(5), whether a condition is a nuisance in fact presents a question of fact. *Ypsilanti Charter Twp. v. Kircher*, 281 Mich.App 251, 269; 761 NW2d 761 (2008). Thus, the trial court's findings of fact are reviewed for clear error. *Id.* at 270. In the application of this standard of review, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding of fact is clearly erroneous if the Court is left with the definite and firm conviction that a mistake has been made. *Capitol Properties Group, LLC v. 1247 Center St., LLC*, 283 Mich.App 422, 430; 770 NW2d 105 (2009). The trial court's ultimate equitable decision is reviewed de novo. *Kircher*, 281 Mich.App at 270.

This Court reviews de novo constitutional issues and any other question of law that arises on appeal. *Cummins v. Robinson Twp.*, 283 Mich.App 677, 690; 770 NW2d 421 (2009).

III. ANALYSIS OF QUESTIONS PRESENTED

The first question appellants present is whether there must be a separate nuisance determination as to each of the individual units comprising Liberty Square. Appellants have abandoned this issue by not properly presenting it for review. Contrary to the requirements of MCR 7.212(C)(7), appellants present no statement as to the preservation of this issue, the standard of review, or any argument with citation to authority to support their position. As such, appellants have waived appellate review. See *Woods v. SLB Property Mgt. LLC*, 277 Mich.App 622, 626–627; 750 NW2d 228 (2008).

*3 Appellants next contend that the evidence presented does not support the trial court's finding of a public nuisance where at most only building code violations were established. We disagree. Giving due regard to the trial court's credibility determinations, its assessment of the weight to be assigned to the evidence, and reasonable inferences to be drawn from the evidence, we conclude that the trial court did not clearly err in finding that "conditions on the property both as to their severity and their location have a natural tendency to create danger and inflict injury to person or property ... that the Liberty Square housing complex is a public nuisance in fact." Moreover, the evidence supported the trial court's equitable remedy of demolition.

MCL 600.2940 provides for abatement of nuisances but does not define the term.

> (1) All claims based on or to abate nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.
>
> * * *
>
> (5) Actions under this section are equitable in nature unless only money damages are claimed. [MCL 600.2940.]

There are two categories of nuisance, which is a

condition: nuisances per se and nuisances in fact. *Martin v. Michigan*, 129 Mich.App 100, 107–108; 341 NW2d 239 (1983). "A nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances." *Id.* at 108. Plaintiff alleged here a nuisance in fact, which "is a nuisance by reason of circumstances and surroundings, and [has a] ... natural tendency ... to create danger and inflict injury to person or property." *Id.* Such a nuisance is also referred to as a public nuisance because the condition "must affect an interest common to the general public, rather than peculiar to one individual, or several." *Garfield Twp. v. Young*, 348 Mich. 337, 342; 82 NW2d 876 (1956). But a nuisance need not affect the entire community "so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right." *Id.* As explained in *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 213 Mich.App 186, 190; 540 NW2d 297 (1995), "[a] public nuisance is an unreasonable interference with a common right enjoyed by the general public." An "unreasonable interference" includes a condition that "significantly interferes with the public's health, safety, peace, comfort, or convenience...." *Id.*

Appellants argue that at best the evidence showed mere building code violations that did amount to a public nuisance. The *Kircher* Court noted minor building code violations, "**such as chipped paint, dripping faucets, improperly caulked bathtubs, improperly caulked windows, missing roof flashing, and small holes in the drywall simply did not rise to the level of public nuisance conditions.**" The conditions were not a nuisance because they "**did not immediately endanger the health and safety of the public or the tenants**" of the property. *Kircher*, 281 Mich.App at 277. However, "**examples of the types of major property maintenance code violations that constituted bona fide nuisance conditions**" included "**exposed live electrical wires, significant accumulations of trash and rubbish, insect and vermin infestations, falling bricks and windows, collapsing walls, and sanitary sewer leakages certainly posed substantial risks to the general health, safety, and welfare of the tenants**" at the property. *Id.*, n 7. Contrary to appellants' argument, the evidence here supports the trial court's findings because the conditions were closer to those found to be a nuisance in ***Kircher*** than the minor violations that were not.

*4 The trial court found the conditions at Liberty Square included: none of the units were weather tight; the majority of roofs of the several buildings were in disrepair and needed to be replaced; fascia throughout the complex had decayed; there was extensive vandalism throughout the complex; more than 50% of the windows were broken-the units were open to the elements; vermin, rodents, and birds had infiltrated many vacant units; and a structural engineer testified improper crawl space construction with lack of ventilation had caused wood rot at the thresholds of many units, which was aggravated by the units not being weather tight. The trial court also described its view of the property revealed that Liberty Square was a "dilapidated and essentially deserted housing area." The trial court found that the "buildings all appeared to be in a significant state of disrepair, with portions of the roofs, fascia and siding missing or falling down." The court also reported that "[t]he foundations at the front and rear entrances of the units appeared to be water damaged and failing." As to the interior of the units, the trial court found that although "the conditions varied from unit to unit, all of the units showed water damage to some extent." This damage "was apparently from leaking roofs with signs of water in virtually every second floor ceiling." In addition, most of the units were deserted and appeared "to have been stripped, either by prior owners or by vandals." Thus, the testimonial and photographic evidence, expert testimony, and the court's own view of the premises support the court's finding of a public nuisance. The trial court wrote in its opinion and order:

As shown by the evidence, the dilapidated and crumbling conditions at Liberty Square pose a con-

tinuing, impending danger to the general public, and to the legitimate property or personal rights of persons living or even entering upon the complex. The conditions on the property both as to their severity and their location have a natural tendency to create danger and inflict injury to person or property. Based on the evidence, the Court finds that the Liberty Square housing complex is a public nuisance in fact.

Appellants argue that the evidence was insufficient to support the trial court's findings because plaintiff's building official, Ron Fulton, admitted he did not inspect appellants' units, and because the court's findings were mere speculation based on an examination of one unit. The record and the trial's reasoning do not support this argument. First, although Fulton did not inspect the interior of appellants' units, which were a minority of the complex, he did inspect the interior of a fair percentage of units that had been seized for non-payment of taxes. Second, the trial court relied on more than just Fulton's testimony; it considered expert testimony, photographic evidence and its own inspection of the premises. Rather than speculation, the trial court's findings were reasonable inferences logically deducible from evidence the court found credible. See *Yoost v. Caspari*, 295 Mich.App 209, 228; 813 NW2d 783 (2012) (discussing the distinction between speculation and reasonable inference). Finally, appellants' argument is essentially that Fulton was not credible and that the testimony that appellants presented to the contrary was. But the trial court found Fulton's testimony credible and the testimony to the contrary submitted by appellants incredible. This Court will generally defer to the fact-finder's determinations regarding credibility and reasonable inferences to be drawn from the evidence. MCR 2.613(C); *Augustine v. Allstate Ins. Co.*, 292 Mich.App 408, 424–425; 807 NW2d 77 (2011); *People v. Schumacher*, 276 Mich.App 165, 167; 740 NW2d 534 (2007).

***5** Appellants also argue that the evidence failed to show that the conditions at Liberty Square affected the general public; consequently, the building code violations could not be considered a public nuisance. This argument is without merit. The trial court credited expert testimony that because of the way the buildings were constructed, it was impossible for a single pristine unit to stand alone. Further, the testimony showed that most units were held as rental properties offered to the general public. In addition, even if a unit were owner occupied, the owner would be a member of the general public as to the other Liberty Square units. Moreover, contrary to appellants' argument, abundant evidence demonstrated that the vacant properties were frequently visited by vandals and trespassers. This evidence supports the conclusion that the conditions at Liberty Square affected the general public that would come in contact with the structures. *Garfield Twp.*, 348 Mich. at 342 (a nuisance affects the public when it "will interfere with those who come in contact with it in the exercise of a public right"). The evidence supported the trial court's finding that "the dilapidated and crumbling conditions at Liberty Square pose a continuing, impending danger to the general public[ ] and to the legitimate property or personal rights of persons living or even entering upon the complex."

Next, appellants argue that the trial court should have only considered the circumstances as they existed on June 1, 2010 in determining whether the conditions at Liberty Square were a nuisance in fact. Apparently, this argument is intended to suggest that the trial court's view of the premises and consideration of the results of that viewing were improper. This argument also fails. First, appellants cite no authority for the proposition that the existence of a nuisance must be determined based on conditions as they exist at a particular point in time. Consequently, this argument must be deemed abandoned because of appellants' failure to cite supporting authority. *Woods*, 277 Mich.App at 626–627. Furthermore, conducting a view is within the discretion of the trial court. *People v. Mallory*, 421 Mich. 229, 245; 365 NW2d 673

(1984). Here, when the trial court announced its intention to view the premises, none of the parties, including appellants, expressed any objection. "A party may not waive objection to an issue and then argue on appeal that the resultant action was error." *Bonkowski v. Allstate Ins. Co.*, 281 Mich.App 154, 168; 761 NW2d 784 (2008).

Appellants present no argument that the trial court abused its discretion by imposing the equitable remedy of abatement by demolition. See, e.g., *Orion Charter Twp. v. Burnac Corp.*, 171 Mich.App 450, 460–461; 431 NW2d 225 (1988) (where it was argued that "demolition is too drastic a remedy" to abate a partially completed housing complex determined to be a nuisance). Therefore, because the trial court did not clearly err in finding that Liberty Square had become a public nuisance in fact, because demolition is a proper remedy in appropriate circumstances, *id.* at 460–462, and because appellants present no argument that demolition is inappropriate in this case, we affirm the trial court's order.

*6 Last, appellants contend the trial court violated their right to due process by dismissing appellants' counter-claims, cross-claims, and third-party claims "[w]ithout motion, argument, or hearing of any kind." We disagree.

At a minimum, appellants have failed to preserve for appeal their claim that the trial court's dismissal of their counter-claims, cross-claims and third-party claims violated appellants' right to due process. Generally, an issue is not properly preserved if it is not raised before, addressed and decided by the trial court or administrative tribunal. *Gen Motors Corp v. Dep't of Treas.*, 290 Mich.App 355, 386; 803 NW2d 698 (2010). Appellants never presented this issue to the trial court. If the trial court acted under MCR 2.116(I)(1) [FN1] and the dismissal of appellants' claims was akin to an order granting summary disposition, appellants never moved the trial court for reconsideration. MCR 2.119(F). Assuming this rule inapplicable because the trial court's decision was not a "decision on a motion," appellants still failed to seek relief from judgment on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect," MCR 2.612(C)(a) or "[a]ny other reason justifying relief from the operation of the judgment." MCR 2.612(C)(f).

> FN1. "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

More fundamentally, appellants' complete lack of presentation regarding the merits of their claims both in the trial court and on appeal in this Court constitutes abandonment. See *Mitcham v. Detroit*, 355 Mich. 182, 203, 94 NW2d 388 (1959). Appellants presented no evidence or arguments in the trial court on the merits of their claims, either before or after the trial court dismissed them as without merit, and present no argument or authority to this Court that their claims have merit. Appellants' only argument on appeal asserts that the trial court's dismissal of their claims violates procedural due process.

Due process is a flexible concept, requiring in a civil case notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker. *By Lo Oil Co. v. Dep't of Treasury*, 267 Mich.App 19, 29; 703 NW2d 822 (2005). Here, appellants were on notice of the nature of the proceedings where plaintiff sought a determination that appellants' property interest in Liberty Square had become a nuisance in fact subject to abatement. Appellants also had ample opportunity to present evidence and argument both opposing plaintiff's action and supporting their counter-claims, cross-claims, and third-party claims. That appellants failed to present any evidence or arguments, either before or after the trial court's decision, does not alter that they had the opportunity to do so. The fundamental requisite of due process is the opportunity to be

heard, *Bullington v. Corbell*, 293 Mich.App 549, 556; 809 NW2d 657 (2011), and appellants had that opportunity before and after the trial court's decision dismissing their claims.

*7 In sum, appellants' due process claim fails because appellants failed to seek relief in the trial court and never presented any argument or authority regarding the underlying merits of their counter-claims, cross-claims, and third-party claims. Moreover, appellants were accorded due process: they were provided notice of the nature of the proceedings and had an opportunity to be heard in a meaningful time and manner by an impartial decision maker. Appellants failed to take advantage of the opportunity to be heard both before and after the trial court's decision. Consequently, appellants were, in fact, accorded due process.

We affirm.

Mich.App.,2013.
Charter Tp. of Ypsilanti v. Grove Park Home Imp. Ass'n
Not Reported in N.W.2d, 2013 WL 1223193 (Mich.App.)

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